of his person, and booked. It appears that the complaint filed against plaintiff ultimately was dismissed by a United States Commissioner. The events surrounding the search and arrest are said by plaintiff to have caused him "great humiliation, embarrassment, and mental suffering," and will continue to do so. Plaintiff prays for a judgment of $15,000 against each of the agents as damages for their unlawful actions.

The district court dismissed the complaint partly upon the ground that it lacked jurisdiction under 28 U. S. C. §1331,[1] which grants to the district courts jurisdiction over actions which arise under "the Constitution, Laws or Treaties of the United States." But under *Bell* v. *Hood*, 327 U. S. 678 (1946), it is clear that the district court had jurisdiction under §1331 to determine whether this complaint, unambiguously founded upon the Fourth Amendment, states a good federal cause of action. See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 649 (1963). The district court, in the alternative, did validly rest its disposition on the merits for failure to state a claim for which relief can be granted. It is on this ground that we affirm.

On July 12, 1968 we reversed the district court's denial of petitioner's motion for leave to appeal *in forma pauperis*, and we granted petitioner's motion for the assignment of counsel. Stephen A. Grant, Esq., has represented petitioner on this appeal. He has the thanks of this court for the conscientious and effective manner in which he has discharged his duties as assigned counsel.

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1 The complaint advances several bases for jurisdiction apart from §1331, but they are inapposite. Only action taken under color of state law is reached by 42 U. S. C. §1983, and 28 U. S. C. §1343(3). To come within 28 U. S. C. §1343(4) plaintiff must be seeking relief "under any Act of Congress." In this case plaintiff seeks relief which is not extended by an Act of Congress, and for action by federal, not state, officials.

There are two distinct questions involved in this appeal. First, we must determine whether the Fourth Amendment authorizes a private suit for damages, caused by an unreasonable search and seizure, which may be brought under the general federal question jurisdiction conferred by §1331. If it does, the question arises whether federal agents acting in their official capacity, but in violation of their lawful and constitutional authority, are immune from suit. See *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied* 339 U. S. 949 (1950); cf. *Pierson* v. *Ray*, 386 U. S. 547, 555-57 (1967). Since we answer the first question in the negative we have no occasion to address the immunity issue.

The view that statutory authority is a prerequisite for a federal cause of action for damages, even though the wrong complained of is the violation of a constitutional right, has been adopted by all of the courts which have examined this question recently. See *United States* v. *Faneca*, 332 F. 2d 872, 875 (5th Cir. 1964), *cert. denied* 380 U. S. 971 (1965); *Johnston* v. *Earle*, 245 F. 2d 793, 796-97 (9th Cir. 1957); *Koch* v. *Zuieback*, 194 F. Supp. 651, 656 (S. D. Cal. 1961), *aff'd* 316 F. 2d 1 (9th Cir. 1963); *Garfield* v. *Palmieri*, 193 F. Supp. 582, 586 (E. D. N. Y. 1960), *aff'd per curiam*, 290 F. 2d 821 (2d Cir.), *cert. denied* 368 U. S. 827 (1961); *Bell* v. *Hood*, 71 F. Supp. 813 (S. D. Cal. 1947). It must be said that few of these opinions have given extensive consideration to the problem, and that only the district court opinion in *Bell* v. *Hood*, *supra*, does so in the context of a claim founded upon the Fourth Amendment. However, we do not agree with the reasoning of this latter decision, which the district court below impliedly adopted by quoting an extensive passage in its memorandum.

In *Bell* v. *Hood* the district court drew a distinction between the "governmental" action prohibited by the Fourth

Amendment and the "private" nature of the unreasonable search and seizure committed by the defendant federal law enforcement officers. The court reasoned that once the officers exceeded the limits imposed on the government by the Amendment they were no longer acting with governmental authority but rather only as individuals, and that therefore they could not be sued under the Amendment.

We cannot accept this rationale. The fact that the officers were acting in violation of the Fourth Amendment's restraints upon governmental action does not belie the plain fact that they were acting as government officials, and not in a private capacity. It was from the federal government that they drew their apparent authority, such that reasonable citizens could not have been expected to resist their unconstitutional intrusion. Action under color of law, which utilizes the power of official position, must be deemed within the scope of the Fourth Amendment.

If, then, we do not find the precedents against plaintiff conclusive, we also note that there are no precedents at all directly in his favor. Plaintiff can cite no case sustaining a federal cause of action claiming a violation of the Fourth Amendment which was not based upon a statute or upon some other basis independent of the Amendment itself. The closest he can come is *West* v. *Cabell*, 153 U. S. 78 (1894), but there the suit was upon the statutory bond of the defendant, a United States marshal; the violation of the Fourth Amendment's requirement concerning the sufficiency of an arrest warrant was held to constitute a breach of the bond. Absent the bond there would have been no cause of action based on the naked Amendment alone.

Thus we are facing as a question of the first impression the issue left for initial resolution to the lower federal courts by the Supreme Court in *Bell* v. *Hood*: whether

a federal cause of action for damages arising out of an unconstitutional search and seizure can rest upon the Fourth Amendment in the absence of statutory authorization for the suit more specific than the general grant of federal question jurisdiction by 28 U. S. C. §1331.

The history of the Fourth Amendment provides no sure answer to our inquiry, but we find it suggestive. The Amendment's prohibition against unreasonable search and seizures had its origin in several English cases which were damage actions for trespass. *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765); see *Huckle* v. *Money*, 95 Eng. Rep. 768 (1763); *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (1763). These cases, and the common law doctrine they evolved, were well known at the time the Fourth Amendment was adopted. *Boyd* v. *United States*, 116 U. S. 616, 626-27, 630 (1886). From this fact plaintiff argues that the drafters of the Amendment must have intended that the constitutional right against unreasonable search and seizure could be enforced by the courts through the medium of private damage actions.

But acceptance of this proposition hardly leads to the conclusion that the private damage action the drafters had in mind was a wholly new federal cause of action founded directly on the Fourth Amendment. It seems more likely that the medium contemplated was the same as that employed in *Entick* v. *Carrington*, *supra*, i.e., the common law action of trespass, administered in our judicial system by the state courts. The Amendment serves to increase the efficacy of the trespass remedy by preventing federal law enforcement officers from justifying a trespass as authorized by the national government. Cf. *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765), quoted in *Boyd* v. *United States*, 116 U. S. 616, 627 (1886).

The resulting situation, in which a constitutional provision is enforced in the state courts, under remedies created by state law, is not at all uncommon under our system. "In the scheme of the Constitution [the state courts] . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." Hart & Wechsler, The Federal Courts and the Federal System 339 (1953). Indeed, Congress did not grant to the federal courts a general jurisdiction extending to cases "arising under the Constitution" until 1875. Act of March 3, 1875, §1, 18 Stat. 470. It would have been natural for the Framers to rely on state remedies for the enforcement of the Fourth Amendment provisions relevant to this case in view of the recognition under the common law of the antecedent right to obtain redress for a trespass.

But, whatever the original distribution of responsibility between the state and federal courts, we now do have the general federal question jurisdiction conferred by §1331. General grants of jurisdiction have been used on rare occasions to formulate rules or remedies revolving around an established federal right, even absent explicit statutory authorization for the evolution of federal common law in these areas. The question before us is whether a similarly appropriate occasion for the implication of a federal remedy is presented by this complaint.

One precedent cited by plaintiff for such an implication is *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943), where the Court acted because of the need for a uniform national rule governing transactions in the commercial paper of the United States. Similar considerations have justified decisions preempting the application of state laws, and adopting a uniform rule of federal common law in their stead, in the fields of admiralty, see e.g., *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953), and regulation of

interstate commerce. See generally *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 141-52 (1963). The Supreme Court has also indicated that the need for the courts of this country to speak with a united voice on matters of foreign policy renders the area of international law appropriate for preemption. *Banco National de Cuba* v. *Sabbatino*, 376 U. S. 398, 423-27 (1964); see *Republic of Iraq* v. *First National City Bank*, 353 F. 2d 47, 50-51 (2d Cir. 1965), *cert. denied* 382 U. S. 1027 (1966). See generally Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024 (1967).

These examples of federal common law are not in point, for what plaintiff asks us to do is not to preempt state law but supplement it because of its alleged ineffectiveness in redressing violations of the Fourth Amendment. More relevant in this context are cases in which the courts have implied a remedy in order to effectuate a right or duty declared by Congress. See *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 207 (1944). While the Supreme Court founded these remedies upon what it regarded as the necessary implication of a statutory scheme, there was no explicit authorization for them. In a similar context we have outlined this approach to these situations:

> "Implication of a private right of action may be suggested by explicit statutory condemnation of certain conduct and a general grant of jurisdiction to enforce liabilities created by the statute . . . or from such considerations as the protection intended by the legislature and the ineffectiveness of existing remedies . . . fully to achieve that end." *Colonial Realty Corp.* v. *Bache*, 358 F. 2d 178, 181 (2d Cir.), cert. denied, 385 U. S. 817 (1966).

Cf. *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F. 2d 486, 490-91 (2d Cir. 1968); *McFaddin Express Inc.* v. *Adley Corp.*, 346 F. 2d 424, 425-26 (2d Cir. 1965), *cert. denied* 382 U. S. 1026 (1966).

We agree with plaintiff that if a remedy in some instances may be implied from a statutory condemnation of conduct then it is also possible for a remedy to be implied from a condemnation in the Constitution itself. However, the cases indicate, with rare exception, that the choice of ways and means to enforce a constitutional right should be left with Congress. It is when a clearly declared right is left so wanting of remedies as to render it a mere "form of words," *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961), that an appropriate occasion for judicial initiative has been reached. See Hart & Wechsler, *supra*, 313-16.

It is now clear that there is an implied injunctive remedy for threatened or continuing constitutional violations. See *Bell* v. *Hood*, 327 U. S. 678, 684 & n. 4 (1946); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 696-97 (1949); *Ex Parte Young*, 209 U. S. 123 (1908); *United States* v. *Lee*, 106 U. S. 196 (1882). This exercise of the general equity powers of the federal court initially may have developed in part because of the lack of an equity jurisdiction in many of the states. See Hart & Wechsler, *supra*, at 578, 650-51. But injunctive relief also seems to be an essential corollary to the power of judicial review established by *Marbury* v. *Madison*, 1 Cranch 137 (1803). The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. Few more unseemly sights for a democratic country operating under a system of limited gov-

ernmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it. Cf. *Cromwell* v. *Benson*, 285 U. S. 22, 56-61 (1932). Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress.

The case of *Jacobs* v. *United States*, 290 U. S. 13 (1933), cited by plaintiff, may present a purer example of a constitutional right with a necessarily implied remedy. The construction of a dam by the government caused repeated overflows onto the plaintiff's land which the court found to constitute a taking of private property for a public use within the meaning of the Fifth Amendment. It may be doubted whether plaintiff could have sued for just compensation absent the Tucker Act, 28 U. S. C. §§1346(a)(2), 1491, which grants to the district courts and the Court of Claims jurisdiction over claims against the government "founded on the Constitution," and on an implied contract. But given this general jurisdictional grant, analogous to §1331 in our case, the damage remedy was implied from the constitutional right itself. The right to just compensation can scarcely be vindicated other than by securing just compensation. Thus the Court read the Fifth Amendment as self-executing, creating a duty to pay upon the government even in the absence of specific statutory authorization for suits to enforce the right to just compensation. 290 U. S. at 16. See *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254, 257 (2d Cir.) (dictum), *cert. denied* 335 U. S. 887 (1948); see generally *Develop-*

ments in the Law—Remedies against the United States and Its Officials, 70 Harv. L. Rev. 827, 876-79 (1957).

A third example of an implied constitutional remedy is the exclusionary rule declared by *Weeks* v. *United States*, 232 U. S. 383 (1914), and applied to the states by *Mapp* v. *Ohio*, 367 U. S. 643 (1961). While not supported by so ready an inference as that underlying the injunctive power, the exclusionary rule provides a strong analogy to it. In allowing the state courts to admit unconstitutionally seized evidence prior to *Mapp* the federal courts were not declaring themselves powerless to prevent violations of the Fourth Amendment; the injunctive power and state trespass actions provided some sanctions for its enforcement. But the courts were allowing state governments to benefit in a real way from the violation of constitutional rights. This situation seems only slightly less offensive to the rule of law than the total absence of injunctive power. Thus the Court viewed the exclusionary rule as necessarily implied in the right to be free from unreasonable search and seizure, since without this remedy the right remained only a "form of words." 367 U. S. at 655.

We do not believe that the remedy of a civil damage action against law enforcement officials also can be said to be implicit in the Fourth Amendment on the ground that it is essential to the effective vindication of the right to be free from unreasonable search and seizure. In general, damage actions against individual officials for past constitutional violations would appear to be much less essential to the maintenance of the rule of law than are remedies to prevent threatened or continuing constitutional transgressions by the government itself, or to prevent the government from benefiting from a constitutional violation. The distinction between governmental and in-

dividual action drawn by the district court in *Bell* v. *Hood* has validity in the sense that the primary thrust of the Bill of Rights is to shield citizens from certain actions by the government. The implication of judicial remedies to provide this shield follows naturally from the declaration of a right; far less natural is the conversion of this shield into a sword directed against individual officials.

While we do not say that the implication of such a damage action can never be essential to the vindication of a constitutional right, it is significant that no clear instance of the implication of such a remedy can be found with reference to any constitutional right. Two possible exceptions are *Wiley* v. *Sinkler*, 179 U. S. 58 (1900), and *Swafford* v. *Templeton*, 185 U. S. 487 (1902). In both cases the Court sustained causes of action for damages against state officials based on their having deprived plaintiffs of the right to vote in federal elections as guaranteed by Art. I, §2 of the United States Constitution.

The Court in both cases seemed to consider only the question addressed in *Bell* v. *Hood*, 327 U. S. 678 (1946)—whether the suits fell within the grant of federal question jurisdiction to the federal courts by virtue of involving the construction and application of the Constitution. See *Swafford* v. *Templeton*, 185 U. S. 487, 491-92, 494 (1902). The Court's attention was not called to the novelty of implying a damage remedy from a constitutional right, in the absence of a specific statutory foundation for the suit, and thus the cases are not persuasive authority for the legitimacy of such a course. It is noteworthy that the damage claims were in fact authorized by a section of the Civil Rights Act, now 42 U. S. C. §1983, and that the court cited as a precedent a criminal case decided under that Act. *Ex Parte Yarbrough*, 110 U. S. 651 (1884). Later cases involving civil actions for denial of a federal right

to vote also explicitly rested on that statute. See, e.g., *Giles* v. *Harris*, 189 U. S. 475, 484-85 (1903) (citing *Wiley* and *Swafford*). Thus the two decisions may have rested on a similar, although implicit, basis. But see *Nixon* v. *Herndon*, 273 U. S. 536, 540 (1927) (suggesting the common law as a basis).

In contrast with *Wiley* and *Swafford* there is no possible specific statutory basis for this suit. And the failure of Congress to provide such a basis has not been the result of inattention to the problem of Fourth Amendment violations by federal agents, or to the issue of the liability of the government and government officials for tortious conduct. Congress has made it a federal crime to execute a search warrant with unnecessary severity or to exceed willfully one's authority in executing it, 18 U. S. C. §2234, to procure the issuance of a search warrant maliciously and without probable cause, 18 U. S. C. §2235, and, in certain circumstances, to search an occupied private building without a warrant. 18 U. S. C. §2236. In the area of the liability of the United States for the torts of its agents we have the Tort Claims Act, 28 U. S. C. §2680, which specifically precludes liability based upon "false arrest," "abuse of process," or the performance of a discretionary function, categories which may well encompass a search and arrest made without a warrant and without probable cause. Because of the special problems surrounding enforcement of the Fourteenth Amendment Congress authorized damage actions against persons acting under color of *state* law to violate a right "secured by the Constitution." 42 U. S. C. §1983.

Only last year, in the Omnibus Crime Control and Safe Streets Act of 1968, P. L. 90-351, 82 Stat. 197, Congress recognized the need for the creation of a private damage remedy for an unauthorized interception of private com-

munications by such means as wiretapping or the use of electronic eavesdropping devices. Section 802 of the Act, 18 U. S. C. A. §2520 (Supp. 1969), provides that a person victimized by such an unauthorized interception is entitled to recover actual damages at a rate of not less than $100 per day for each day of intereception, or a total of $1000 if this is greater, and also may recover punitive damages, and a reasonable attorney's fee together with other litigation costs. By providing a mandatory minimum recovery Congress avoids the danger that the damage remedy will become illusory because of the possible reluctance of juries to return more than trivial judgments against law enforcement officers. Yet Congress also provides some protection to these officers by declaring that proof of a good faith reliance on a court order, or on an order of emergency authorization issued by a prosecuting attorney under 18 U. S. C. A. §2518(7) (Supp. 1969), is a complete defense to a damage action.

Congress found that there was a special need for legislation, and a civil damage remedy, to secure the right of privacy of individuals against surreptitious invasions, invasions which often will constitute violations of the Fourth Amendment if accomplished by government agents yet may not come within the scope of state trespass actions. See *Katz* v. *United States*, 389 U. S. 347, 353 (1967). It is of course open to Congress also to determine that there is a similar need for a federal damage action to remedy violations of the Fourth Amendment which do not involve wiretapping or eavesdropping. Thus far, despite the legislation which we have cited above covering closely related matters, Congress has not made such a determination. We do not believe it is appropriate for this court to fill the hiatus left in this area by Congress, see *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963), since we find that the

absence of a federal damage action has not rendered illusory the right to remain free from unreasonable search and seizure in view of the other remedies available for its enforcement.

The existing remedies for an unconstitutional search or seizure may not provide a totally effective enforcement scheme for Fourth Amendment rights, but they do substantially vindicate the interests protected by the Amendment. The exclusionary rule of *Weeks* and *Mapp* prevents the federal and state governments from obtaining any prosecutorial advantage by virtue of unconstitutional conduct such as is alleged in plaintiff's complaint, and thus acts as a deterrent to this conduct. Injunctive relief is available to plaintiff if he can prove that he is threatened by repeated or continuing invasions of his constitutional right of privacy. Finally, the state damage actions for trespass and false imprisonment, while admittedly of limited value because of their limited scope, see *Wolf* v. *Colorado*, 335 U. S. 25, 42-44 (1949) (Murphy, *J.* dissenting), may provide plaintiff with a damage recovery if he can establish a deliberate, and not a merely technical, violation of the Fourth Amendment.

The most basic problem with the state remedies, after all, is the understandable reluctance of both judge and jury to penalize law enforcement officers for violations of our increasingly technical body of Fourth Amendment jurisprudence. It is unlikely that federal judges and juries would be any less reluctant in this respect than their state counterparts. But this reluctance should disappear when a trespass or arrest involving genuinely malicious action by the police is involved.

Judicial recognition of private damage action under the Fourth Amendment would carry with it the responsibility for developing a body of federal common law

governing such questions as the types of damage recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of action. See 18 U. S. C. A. 2520 (Supp. 1969) (statutory civil action for unauthorized wiretapping, *et al.*). A federal court should not begin to travel down this long and uncertain road unless it is persuaded, as we are not, that the journey is essential to insure the vitality of a constitutional right. These closely balanced policy decisions concerning the manner in which to enforce a federal right normally should be left to Congress; the civil remedy created by the Safe Streets Act, *supra*, demonstrates that Congress will respond when the need for a federal damage action against law enforcement officials is manifest. Plaintiff has not convinced us that the federal courts should depart from this sound principle of judicial restraint.

The order of the district court dismissing the complaint is affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the holding that plaintiff has a cause of action, albeit a "state-created" cause of action, and which, if the facts he alleges are proven, may not be defeated by the defendants unless they successfully substantiate personal immunities from civil liability. It is my thought that by virtue of 28 U. S. C. §1331 the federal courts can also entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages allegedly occasioned by their unnecessarily severe acts. Here they invaded an apartment without any warrant and placed plaintiff

in manacles while they conducted a constitutionally impermissible search of the apartment. See 18 U. S. C. §2234 and 18 U. S. C. §2236. But see 26 U. S. C. §7607, since the defendants here are narcotics agents.

The majority point out that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961) was federally promulgated and that federal courts may enjoin federal officers from future acts which, if not enjoined, would violate the provisions of the federal constitution. It seems evident to me, therefore, that, logically, if we should wish to ensure to an individual the fullest protection of his constitutional rights, an action against federal officers for trespassory damages should be maintainable in the federal courts.

Nevertheless, the important point is the recognition that a suit will lie somewhere; and, if it seems preferable *as of now* to say that when a citizen has been damaged by a wilful or malicious violation of the federal constitution by federal officers he must rely upon his "state-created" right for his redress and may pursue vindication only in the state courts, I am prepared to concur in that holding.

Even under the doctrine here announced, a federal officer sued in a state court may, of course, at his option, remove the case to the appropriate federal court under 28 U. S. C. §1442, and thereby adjudication of a plaintiff's action based upon his "state-created" right would, despite our today's holding, be adjudicated in a federal court.

JUDGMENT

R. 125

UNITED STATES COURT OF APPEALS

for the

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of April one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD, CHIEF JUDGE,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

WEBSTER BIVENS,

Plaintiff-Appellant,

v.

6 UNKNOWN NAMED FEDERAL NARCOTIC AGENTS

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

SUPREME COURT OF THE UNITED STATES

No. 240 Misc., October Term, 1969

WEBSTER BIVENS,
Petitioner,

v.

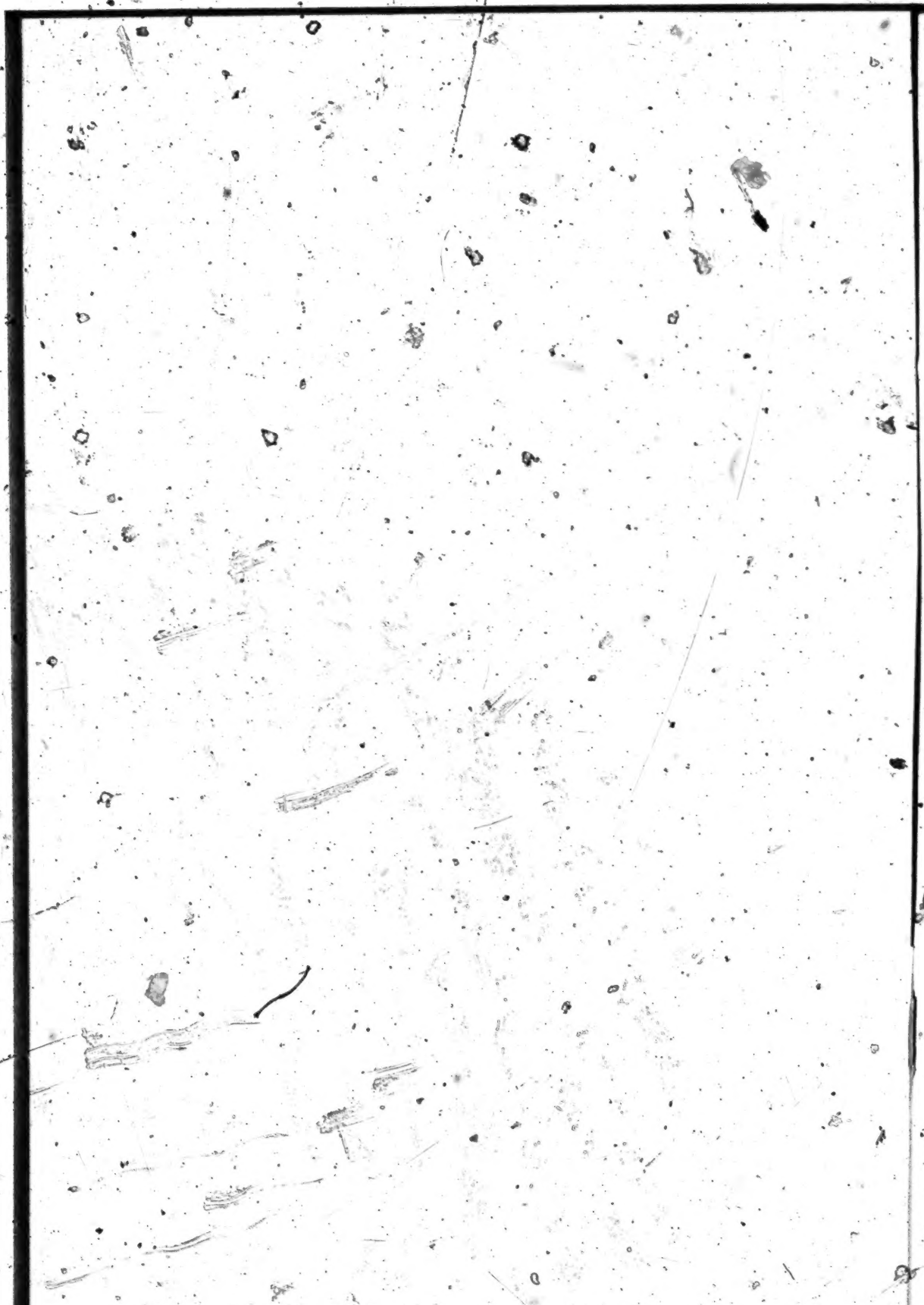
SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1733 and placed on the summary calendar.

And it is further orderd that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 22, 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 301

WEBSTER BIVENS,

Petitioner,

v.

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court (A. 35-40) reaffirming its initial memorandum and order dismissing the complaint (A. 34) is reported in 276 F. Supp. 12. The opinion of the court of appeals affirming the judgment (A. 44-59) is reported in 409 F.2d 718.

JURISDICTION

The judgment of the court of appeals (A. 61) was entered on April 10, 1969 and a petition for a writ of certiorari was filed on May 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

28 U.S.C. § 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

QUESTIONS PRESENTED

1. Whether violation of the constitutional right to be secure from unreasonable search and seizure gives rise to a federal claim for damages.

2. Whether the defense of governmental privilege extends to federal officers clearly violating constitutional rights and acting manifestly beyond the scope of authority.

STATEMENT OF THE CASE

At about 6:30 A.M. on the morning of November 26, 1965 the six respondents, as agents of the Federal Bureau of Narcotics, forced their way into Bivens' home with drawn firearms and proceeded to search the premises. The agents forcibly handcuffed Bivens in the presence of his wife and children, placing him under arrest for violation of the narcotics laws. They threatened to arrest the entire family.

They then took Bivens away to be questioned, fingerprinted, photographed and booked, as well as subjected to a thorough and humiliating search of his person. At all times the agents acted without the authority of a search or arrest warrant. A complaint against Bivens was dismissed by a United States Commissioner. (A. 1-2, 28-29, 46).

Bivens, acting *pro se*, brought a civil suit for damages against the unknown agents in the United States District Court for the Eastern District of New York, alleging violation of his constitutional rights under the Fourth Amendment. The complaint sought damages for humiliation, embarrassment and mental suffering in the amount of $15,000 from each of the defendants (A. 2). On defendants' motion, the district court dismissed the complaint. It concluded that a damage claim could not be sustained where no express constitutional or statutory provision afforded such a remedy and where the defendants were acting in the performance of duty (A. 34-40). The judgment was affirmed by the United States Court of Appeals for the Second Circuit which held that, absent legislation granting such a remedy, the Fourth Amendment standing alone does not provide a basis for a federal damage claim arising out of an unconstitutional search and seizure (A. 45-59).

SUMMARY OF ARGUMENT

I. The federal courts have traditionally enforced constitutional rights without any statutory provision for a remedy. This is well established by decisions upholding jurisdiction for violation of voting rights and a long line of cases awarding equitable relief to protect constitutional rights. Federal damage claims have heretofore not been raised because traditional pleading conventions considered unconstitutionality pertinent only to the defense of justification and disallowed anticipation of defenses in actions at law.

The Fourth Amendment was intended by the framers to be enforced against government officers by damage actions

governed by federal law. The framers' intent cannot be disregarded when existing remedies under state law have become completely impotent because of uncertainty as to the right to meaningful recovery. Unless uniform federal law applies, identical conduct in an unconstitutional search and seizure will entail liability if committed by a state but not by a federal officer, and if committed in one jurisdiction but not in another. A federal claim cannot be denied out of deference to Congress where no intent to preclude a remedy has been expressed and constitutional rights are at stake.

Federal jurisdiction over claims based on constitutional rights has been recognized by a long line of cases both for damages and equitable relief. Denying jurisdiction would only delay settlement of a suit subject to removal, and perpetuate the anomaly of suing federal officers in state court while state officers are sued in federal court under the Civil Rights Act.

II. Government officers have traditionally been held personally liable for wrongful invasion of private property. The notion that they enjoy a privilege for manifestly unauthorized conduct is based on a misreading of decisions protecting the legitimate exercise of discretion. The discretionary immunity doctrine does not erect a protective shield around executive conduct comparable to that accorded the judiciary. The established law on privilege bars liability for a search and seizure reasonably believed valid even though later held unconstitutional. That is all the officer can reasonably claim and society can afford to give. The public interest in vigorous law enforcement must be reconciled with other values and the dominant interest is on the side of the victim when constitutional rights have been violated.

ARGUMENT

I. VIOLATION OF THE CONSTITUTIONAL RIGHT TO BE SECURE FROM UNREASONABLE SEARCH AND SEIZURE GIVES RISE TO A FEDERAL CLAIM FOR DAMAGES.

The complaint alleges an invasion of Bivens' home by the defendant officers without a search warrant in violation of his right to be secure from unreasonable search and seizure. See, *e.g.*, *Agnello v. United States*, 269 U.S. 20 (1925). The complaint having raised a substantial question arising under the Constitution, jurisdiction has been properly invoked under 28 U.S.C. § 1331(a). *Bell v. Hood*, 327 U.S. 678 (1946).

The possibility of a federal damage claim for an unconstitutional search and seizure was recognized in *Bell v. Hood*, *supra*, where this Court upheld federal question jurisdiction in a suit against individual FBI agents. In an opinion by Mr. Justice Black, the Court defined the issue as "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments" and affirmed that this question "has never been specifically decided by this Court." But, in remanding the case, the Court pointed out that jurisdiction had been sustained in damage suits for deprivation of voting rights in violation of the Constitution and in equity suits for injunctions to protect rights safeguarded by the Constitution, and that from the beginning courts have been alert to adjust their remedies to grant necessary relief where federally protected rights have been invaded. 327 U.S. at 684.

A. Judicial Enforcement of Constitutional Rights

The federal courts have traditionally enforced constitutional rights without any statutory provision for a remedy. In *United States v. Lee*, 106 U.S. 196 (1882), the plaintiff sued individual officers in ejectment to recover land taken without compensation. This Court affirmed a judgment

returning possession to the plaintiff. Quoting the Fifth Amendment, it declared:

> "Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them." 106 U.S. at 218.

The Court regarded enforcement of the Fifth Amendment by the traditional remedy of ejectment as standing on the same ground as issuing writs of habeas corpus to protect constitutional liberty. 106 U.S. at 218-20.

In *Wiley v. Sinkler*, 179 U.S. 58 (1900), the plaintiff sued election officials in federal court for damages for denial of his right to vote in a congressional election. Upholding jurisdiction to hear the claim, this Court declared that the right to vote had "its foundation in the Constitution of the United States." 179 U.S. at 62. In a similar case, *Swafford v. Templeton*, 185 U.S. 487 (1902), the Court reaffirmed that the suit arose under the Constitution, insisting that "the action sought the vindication or protection of the right to vote for a member of Congress, a right . . . 'fundamentally based upon the Constitution . . . .'" 185 U.S. at 492. Although the voting rights decisions were addressed to jurisdiction rather than the right to relief, other precedents expressly recognize a constitutional basis for a claim to damages. In *Jacobs v. United States*, 290 U.S. 13 (1933), a suit for damages caused by flooding, this Court said of the right to compensation:

> "That right was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." 290 U.S. at 16.

See also *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 646, 648-49 (1911).

By far the most impressive authority for judicial enforcement of private claims under the Constitution is the long line of decisions granting equitable relief to protect constitutional rights. In *Ex parte Young*, 209 U.S. 123 (1908), the plaintiff sued to enjoin enforcement of an allegedly unconstitutional rate statute. In sustaining jurisdiction without diversity of citizenship, this Court rejected the argument that no question arising under the Constitution was presented to otherwise support federal jurisdiction. After ruling the challenged statutory provisions were unconstitutional, it declared:

> "The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem and . . . [an] injunction . . . ." 209 U.S. at 149.

This question the Court answered in the affirmative. See also, *e.g.*, *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *City of Mitchell v. Dakota Central Tel. Co.*, 246 U.S. 396, 407-08 (1918); *Central Kentucky Natural Gas Co. v. Railroad Comm'n*, 290 U.S. 264, 269-72 (1933); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

The court below was impressed by the paucity of decisions sustaining federal damage claims for constitutional violations (A. 55). What is significant, however, is not that such claims have been rejected by the courts. They have not been raised for decision. This cannot be because damage claims have somehow been assumed less "federal" than equitable claims. The more plausible answer lies in the traditional pleading conventions which prevailed prior to the advent of code pleading. See Hill, *Constitutional Remedies*, 69 Colum.L.Rev. 1109, 1128-31 (1969). In a trespass action at law, the traditional declaration could allege only the plaintiff's interest and the defendant's intrusion. That the defendant was discharging an official duty was a defense which could be raised only in the answer. That the action was nevertheless unconstitutional was an attack on this defense

to be made in the replication. See *Chaffin v. Taylor*, 114 U.S. 309, 309-10 (1884); Hill, *supra* at 1128, and authorities cited therein. For federal question jurisdiction, requiring that the federal basis appear on the face of the complaint, only necessary allegations were considered and the anticipation of defenses was disallowed. Thus a damage action for a constitutional violation was always cast in terms of a state-created right and had to be brought in state court because the federal right could not be pleaded in the complaint. This was, of course, not the situation in equity. The traditional bill could anticipate defenses and had to set forth the constitutional claim in order to justify the extraordinary grant of equitable relief. See *Ex parte Young*, *supra*, 209 U.S. at 129-31; Hill, *supra* at 1129, and authorities cited therein.

B. Fourth Amendment Claims Governed by Federal Law

It is well known that the Fourth Amendment had its origin in English law in the landmark case of *Entick v. Carrington*, 19 How.St.Tri. 1029 (1765), a trespass action against the King's messengers for an unreasonable search and seizure. It is also clear beyond doubt that the framers intended the constitutional guarantee in this country to be enforced by damage actions against government officers. In urging adoption of the Bill of Rights, Madison affirmed his oft-quoted conviction that:

> "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789)

What he had in mind for unlawful search and seizure was not the exclusion of illegally seized evidence. For "when the Fourth Amendment was adopted, the rules governing arrests and searches were enforced only by direct remedies such as suits for damages for false imprisonment or trespass." Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, [1960] Sup.Ct.Rev. 46, 54. In the leading case of *Boyd v. United States*, 116 U.S. 616 (1886), this Court quoted the words of Lord Camden in *Entick v. Carrington, supra*, that "No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing," and declared that the *Entick* decision was the source of the Fourth Amendment and its principles affected the very essence of constitutional liberty and security. 116 U.S. at 626-30. See also *Berger v. New York*, 388 U.S. 41, 49 (1967).

The court below, though recognizing the framers' intent that the Fourth Amendment be enforced by private damage actions, concluded that the remedy contemplated was not "a wholly new federal cause of action founded directly on the Fourth Amendment" but "the common law action of trespass, administered in our judicial system by the state courts."[1] Thus the question was simply another instance of enforcement of a constitutional provision "in the state courts, under remedies created by state law" (A. 49). A federal damage claim was not essential to effective enforcement because existing remedies "substantially vindicate" the interests protected by the Fourth Amendment (A. 58). To recognize such a claim would lead down a "long and uncertain road" in developing "a body of federal common law". The closely balanced policy decisions concerning the manner of enforcing a federal right "normally should be left to Congress". (A. 58-59)

[1]Harking back to formalistic pre-code pleading which regarded constitutional claims as pertinent only to the defense of justification, the court noted that the Amendment "serves to increase the efficacy of the trespass remedy by preventing federal law enforcement officers from justifying a trespass as authorized by the national government." (A. 49).

The basic flaw in the court of appeals' analysis is the confusion between (i) the source of law which gives rise to the claim and (ii) the form of the action and the forum in which it is asserted. In the first instance, the question is not whether the framers contemplated actions in common law trespass before federal or state tribunals. It is whether, as a matter of substantive law, the plaintiff's claim in such actions was intended to be governed and secured by federal law derived from the Fourth Amendment or by state law based on varying notions of personal tort liability. The answer to this question is compelled by the Fourth Amendment itself. The framers were not content to leave the freedom from unreasonable searches and seizures as a common-law right, albeit definitively established by *Entick v. Carrington*. They insisted on elevating that freedom to a constitutional guarantee, thereby establishing a right which could not be diluted or negated by state, or even federal, law. Clearly this was no mere promise of a right without a remedy, a statement of principle hopefully to be honored by the Executive and implemented by the Legislative branches. With the *Entick* case in mind, it was meant as a guarantee to be jealously protected by the courts, state and federal, by enforcement of damage claims against individual government officers. Above all, it was a constitutional not a common-law guarantee. It was meant to be respected as paramount law by the courts in cases properly before them. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). As such, whether the guarantee has been violated is a federal question. Whether and how it is enforced is a matter of federal concern. To conclude otherwise is to ignore the history of the Fourth Amendment and leave enforcement of the rights secured thereby subject to the changing rules of the common law as though there were no constitutional guarantee.

The framers' intent cannot be disregarded on the court of appeals' comforting assumption that existing remedies "substantially vindicate" the freedom guaranteed by the Fourth Amendment. The exclusionary rule removes the

incentive for unlawful searches specifically intended to secure evidence needed for prosecution but in no way deters such abuses where the purpose is unclear or even unrelated to prosecution. See *Irvine v. California*, 347 U.S. 128, 135-36 (1954); ALI, *Model Code of Pre-Arraignment Procedure*, Tent.Draft No. 3, Part II—"Search and Seizure", pp. xix-xx (1970); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (over 300 illegal searches to capture suspected police killer). The rule only protects one against whom incriminating evidence is discovered and then simply as a shield against further abuse in prosecution. It does nothing for the innocent victim of a fruitless search and in no way compensates either the guilty or innocent for invasion of their Fourth Amendment rights. The only way to vindicate such rights is by the traditional damage action against the individual officers concerned. The dearth of such suits under state law suggests not that Fourth Amendment rights are being "substantially vindicated" but that the traditional trespass remedy has become "completely impotent", Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 498 (1955), and "worthless and futile". *Mapp v. Ohio*, 367 U.S. 643, 652 (1961). The reason cannot be simply that victims swallow their outrage in silence out of anticipation that a jury will be reluctant to penalize police officers (A. 58). The plain fact is that in most states the law governing unlawful searches and seizures is at best unclear and at worst inadequate. Wholly apart from uncertainties as to the defendant's immunity, the various local rules on damages leave the prospect of meaningful recovery very much in doubt. See *Wolf v. Colorado*, 338 U.S. 25, 42-44 (1944) (Murphy, J., dissenting); *Basista v. Weir*, 340 F.2d 74, 86-87 n.11 (3d Cir. 1965); *Mason v. Wrightson*, 205 Md. 345, 109 A.2d 129 (1954) (one cent damages for illegal search of person in public); Foote, *supra* at 498. The basic problem is that in most jurisdictions the common law of trespass has developed in the context of intrusions by private citizens rather than

the more serious abuses by government agents. Thus, in concurring in *Monroe v. Pape*, 365 U.S. 167 (1961), Mr. Justice Harlan observed:

> "Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violation of common-law rights by private citizens were fully appropriate to redress those injuries which only a . . . [government] official can cause and against which the Constitution provides protection." 365 U.S. at 196 n.5.

But enforcement of the Fourth Amendment cannot be left to coincidence. The remedy for violation of a federal guarantee cannot be left impotent and worthless because of the inadequacies of state law.

Recognition of a federal claim would not, as feared by the court below, lead down a "long and uncertain road" in developing

> "a body of federal common law governing such questions as the types of damage recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of action" (A. 58-59).

The road has already been well-travelled in federal suits against state officers under the Civil Rights Act, 42 U.S.C. § 1983, considering in particular each of the questions cited by the court. See, *e.g.*, *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965) (damages recoverable and injuries compensable); *Pierson v. Ray*, 386 U.S. 547 (1967) (immunity); *Monroe v. Pape, supra*, 365 U.S. at 187-88 (1961) (intent); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (statute of limitations). Thus recognition of a federal claim "does not require the fashioning of a whole new body of federal law, but merely removes a bar to access" to existing law. *Moragne v. States*

Marine Lines, Inc., 398 U.S. 375, 405-06 (1970). Such recognition, moreover, is necessary to eliminate unjustifiable "anomalies of present law". *Ibid.*, 398 U.S. at 395. Otherwise, identical conduct violating the constitutional freedom from unreasonable search and seizure will entail liability if committed by a state officer but not if by a federal officer. Identical conduct by a federal officer will entail liability if committed in one jurisdiction but not in another. Vindication of constitutional rights will depend upon which badge the defendant is wearing or on which side of a particular state boundary he happens to act.

The framers' intent and the need for a federal remedy cannot be denied simply out of deference to Congress. Rules of tort liability in trespass have traditionally been developed by the courts. New legislation in such well-charted waters might well be limited to a counterpart of 42 U.S.C. § 1983 for acts "under color of" federal law. The federal courts would then be left with the same task they face now. Congress has given "no affirmative indication of an intent to preclude the judicial allowance of a remedy", *Moragne v. States Marine Lines, Inc.*, *supra*, 398 U.S. at 393, and none can fairly be implied from the remedy granted by 42 U.S.C. § 1983 for misconduct under color of state law.[2] Withholding a federal remedy simply as a matter of judicial restraint cannot be justified where constitutional rights are at stake. Compare *Wheeldin v. Wheeler*, 373 U.S. 647 (1963). The fact is that Congress has not acted and may not act, particularly with political pressures running against restraints on police conduct. See *District of Columbia Court Reform and Criminal Procedure Act of 1970*, P. L. 91-358 § 23-591, 84 Stat. 473, 630 (authorizing "no-knock" entry). Protection of constitutional rights cannot turn on the vagaries of public opinion. As anticipated by the framers, it is

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[2]The statutory remedy was enacted as part of the Civil Rights Act of 1871 which was understood as necessary "to enforce the provisions of the Fourteenth Amendment." 17 Stat. 13. See *Monroe v. Pape*, *supra*, 365 U.S. at 171.

the courts "which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks v. United States*, 232 U.S. 383, 392 (1914). And it is the courts which must insure that such rights are maintained.

Thus the issue raised is nothing less than the proper role of the judiciary where constitutional rights have been violated by agents of the Executive and no remedy has been provided by the Legislative. But the question is not whether to create tort liability for conduct that is otherwise not actionable or to fashion a new remedy where none before existed. Compare *Wheeldin v. Wheeler, supra; J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). Nor is it whether to override a substantial state interest that even arguably should be respected in a federal system. Compare *Monroe v. Pape, supra; Mapp v. Ohio, supra.* It is not even whether the remedy should be given by a federal rather than a state court since any state suit will almost certainly be removed to federal court under 28 U.S.C. § 1442(a). The question is simply whether the plaintiff's claim is to be governed by federal law which will vindicate his rights under the Fourth Amendment or by the prevailing notion of trespass liability in the state where suit happens to be brought. As to this, the intent of the framers is clear. The inadequacy of existing remedies under state law is clear. The answer to the question itself is clear in the decisions of this Court recognizing claims for equitable relief to protect constitutional rights. The conclusion cannot be different simply because the claim is for damages. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief:" *Bell v. Hood, supra*, 327 U.S. at 684.

C. Jurisdiction Over Fourth Amendment Claims

Federal jurisdiction over claims based on constitutional violations was recognized not only in the two voting rights cases, *Wiley v. Sinkler, supra; Swafford v. Templeton, supra,* but also in the long line of decisions in suits for equitable relief. See, *e.g., Ex parte Young, supra.* The mandate of 28 U.S.C. § 1331(a) to hear "all civil actions" arising under the Constitution can hardly be sufficient to sustain jurisdiction where the claim is for equitable relief but not where it is for damages.[3] Notwithstanding common law pleading conventions, it is clear that "a short and plain statement of the claim" under Fed.R.Civ.P. 8(a) includes the allegation that the plaintiff's constitutional rights have been violated, regardless of the relief requested. And it is clear that the case "arises under" the Constitution because the plaintiff's claim that he has been subjected to an "unreasonable" search or seizure will be sustained if the Constitution is given one construction and defeated if it is given another. *Bell v. Hood, supra,* 327 U.S. at 685; *Powell v. McCormack,* 395 U.S. 486, 514 (1969).[4]

Denying jurisdiction will serve no useful purpose in suits against federal officers. If the plaintiff is required to sue in state court, the defendant will almost invariably have the case removed under 28 U.S.C. § 1442(a). Such suits always involve the officer's defense of immunity and "one of the primary purposes" of the removal statute was "to have such defenses litigated in the federal courts." *Willingham v. Morgan,* 395 U.S. 402, 407 (1969). Thus, denying jurisdic-

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[3]The mandate was in terms of "all suits of civil nature, at common law or in equity", 28 U.S.C. § 41(1) (1940 ed.), prior to its amendment in 1948 to conform to Fed.R.Civ.P. 2.

[4]In the event this Court concludes that the plaintiff does not have a federal claim for damages, it should deny the defense of governmental privilege and remand the case to the district court for determination of his claim under state law. See *Hurn v. Oursler,* 289 U.S. 238 (1933).

tion will achieve nothing in judicial economy and serve only to delay determination of the plaintiff's claim. In addition, far from serving any legitimate state interest, it will merely perpetuate the anomaly of suing federal officers in state court while state officers are sued in federal court under the Civil Rights Act, 42 U.S.C. § 1983.

II. THE DEFENSE OF GOVERNMENTAL PRIVILEGE DOES NOT EXTEND TO FEDERAL OFFICERS CLEARLY VIOLATING CONSTITUTIONAL RIGHTS AND ACTING MANIFESTLY BEYOND THE SCOPE OF AUTHORITY.

The alleged search and seizure constituted a clear violation of Bivens' rights under the Fourth Amendment. It was manifestly beyond the bounds of any authority conferred under 26 U.S.C. § 7607 and punishable by criminal penalties under 18 U.S.C. § 2236. Nevertheless, the government insists the defendants are immune from suit because exposing federal officers to personal liability would inhibit vigorous and effective discharge of their duties.[5] The district court sustained such immunity as an alternative ground for dismissing the complaint (A. 34, 40). The court of appeals never reached the question, concluding that the complaint failed to state a valid claim (A. 47). The question is a matter of federal law. *Howard v. Lyons*, 360 U.S. 593, 597 (1959).

[5] In the court below the government argued in its brief—"Even assuming, *arguendo*, that appellant had alleged a clear, conscious violation of his Fourth Amendment rights, the agents would still be immune from civil liability."

A. Personal Liability at Common Law

At common law it was well established that government officers were personally liable for wrongful invasion of private property. In trespass actions the question was traditionally not one of immunity but whether the officer was acting in the discharge of his duty and in accordance with authority validly conferred. See, *e.g.*, *Entick v. Carrington, supra; Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *Bates v. Clark*, 95 U.S. 204 (1877). The claim that such officers were shielded by the government's sovereign immunity was repeatedly rejected:

> "[T]he exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States." *Belknap v. Schild*, 161 U.S. 10, 18 (1896).

See also *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619 (1912). In denying immunity to a government-owned corporation, Mr. Justice Holmes proclaimed "one of the first principles" of our system of law:

> "that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him . . . . An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts." *Sloan Shipyards Corp. v. United States Shipping Bd. Emer. Fleet Corp.*, 258 U.S. 549, 567 (1922).

B. The Doctrine of Discretionary Immunity

The surprising notion that government officers enjoy a privilege or immunity for manifestly unauthorized conduct is based on a misreading of this Court's decisions protecting the legitimate exercise of discretion. The leading case is *Spalding v. Vilas*, 161 U.S. 483 (1896), a suit against the Postmaster General for distribution of an allegedly defamatory circular. After thoroughly analyzing the defendant's conduct, this Court concluded that it was "not unauthorized by law, nor beyond the scope of his official duties". 161 U.S. at 493. Turning then to whether liability could nevertheless be imposed if he had acted maliciously, the Court concluded:

> "As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision . . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages . . . . In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial." 161 U.S. at 498-99.

This absolute privilege was extended to lesser executive officers in *Barr v. Matteo*, 360 U.S. 564 (1959), a suit against an official of the Rent Stabilization Agency based on an allegedly defamatory press release. Mr. Justice Harlan stated the rationale underlying the privilege and concluded that it should not be restricted to officers of cabinet rank:

> "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies . . . and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government . . . .
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> "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra (161 U.S. at 498)—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity . . . ." 360 U.S. at 571, 573-74.

He then concluded that the privilege was applicable because the press release publication was an appropriate exercise of discretion and "within the outer perimeter" of the defendant's "line of duty". 360 U.S. at 574-75.

Implicit in the *Vilas* and *Barr* decisions is the assumption that the privilege will not shield conduct manifestly beyond the scope of authority. This was recognized in *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), a suit against a federal investigator who had issued an unauthorized subpoena. The Court said the defendant "was not acting sufficiently within the scope of his authority to bring the doctrine into play." In dissent, Mr. Justice Brennan agreed that the defense had never shielded conduct beyond the outer perimeter of duty and affirmed that a federal officer "remains liable for acts committed 'manifestly or palpably beyond his authority.'" 373 U.S. at 651, 653. Most of the lower federal court decisions are in accord. See, *e.g.*, *Colpoys v. Gates*, 118 F.2d 16 (D.C. Cir. 1941) (no immunity for marshall's public statements not in line of duty); *Colpoys v. Foreman*, 163 F.2d 908 (D.C. Cir. 1947) (no immunity for marshalls' forcible entry in executing civil process); *Kozlowski v. Fer-*

rara, 117 F. Supp. 650 (S.D.N.Y. 1954) (no immunity for arrest without probable cause). In particular, the courts of appeals for the First and Ninth Circuits have rejected the defense as inapplicable to an unconstitutional search and seizure. See *Kelley v. Dunne*, 344 F.2d 129 (1st Cir. 1965); *Hughes v. Johnson*, 305 F.2d 67, 70 (9th Cir. 1962).

There are, however, a few cases misapplying discretionary immunity to shield manifestly unauthorized conduct. The leading decision is *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965), a damage suit against U.S. Deputy Attorney General Katzenbach and other officers brought in the wake of James Meredith's enrollment in the University of Mississippi. The complaint alleged unlawful arrest and detention without probable cause.[6] The court of appeals affirmed dismissal on the theory that the defendants were acting "within the outer perimeter of their line of duty" and their conduct had "more or less connection with the general matters committed by law to their control and supervision". Their actions also involved a "decision which it is necessary that these officers be free to make without fear or threat of vexations or fictitious suits and alleged personal liability". 332 F.2d at 862.[7] See also *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Wheeldin v. Wheeler*, 302 F.2d 36 (9th Cir. 1962), *aff'd on other grounds*, 373 U.S. 647 (1963); *Scherer v. Brennan*, 379 F.2d 609

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[6]Specifically that the plaintiffs (i) were arrested on a public highway without probable cause, (ii) detained for 21 hours, including 18 hours sitting in a rigid position without speaking, eating or drinking, (iii) subjected to vile abuse and mistreatment, and (iv) assaulted with a large stick or billy club. 332 F.2d at 857.

[7]Judge Gewin wrote a vigorous dissent, 332 F.2d at 863. The majority's decision was also rejected by the First Circuit in *Kelley v. Dunne*, *supra*, 344 F.2d at 133.

(7th Cir.), *cert. denied*, 389 U.S. 1021 (1967);[8] *Swanson v. Willis*, 114 F. Supp. 434 (D. Alaska 1953), *aff'd*, 220 F. 2d 440 (9th Cir. 1955) (*per curiam*); *Hartline v. Clary*, 141 F. Supp. 118 (E.D. S. Car. 1956).

C. The Defense of Executive Privilege

The doctrine of discretionary immunity was never intended to erect a protective shield around executive conduct comparable to that accorded the judiciary. The *Vilas* decision was handed down less than one month after this Court reaffirmed the traditional rule of tort liability in *Belknap v. Schild, supra*. It said nothing about discarding established rules as to when conduct is privileged and held simply that otherwise privileged conduct was shielded from judicial inquiry and personal liability based solely on an allegation of malice.[9] To be sure, the Court invoked the analogous doctrine of judicial immunity already recognized in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). And it reformulated the concept of "clearly no jurisdiction over the subject matter" in *Bradley*, 80 U.S. at 351-52, into "matters which are manifestly or palpably beyond . . . authority", at the same time distinguishing "action having more or less connection with the general matters committed by law to . . . control or supervision" 161 U.S. at 498. But simply drawing an analogy cannot fairly be construed as proclaim-

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[8]On the facts neither the *Gregoire* nor the *Scherer* decisions involved conduct manifestly beyond the scope of authority but in each case the court purported to recognize immunity as though it had. The *Wheeldin* decision did involve such conduct but, as discussed above, its recognition of immunity was reversed by this Court.

[9]The Court quoted at length *Dawkins v. Lord Paulet*, L.R. 5 Q.B. 94, 114 (Mellor, J.): "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think the law regards the doing of the duty and not the motives from or under which it is done . . . . Does an action lie against a man for maliciously doing his duty? I am of the opinion that it does not." 161 U.S. at 496.

ing a new "jurisdictional" test for determining executive privilege and suggesting that an officer acting more or less within his jurisdiction is as immune as a judge.[10] The concept of jurisdiction suffices to chart the bounds of judicial privilege because the perimeter is fairly well defined and all matters within it are committed by law to the control or supervision of the judge. But it offers little guidance for determining permissible executive conduct where the perimeter is itself elusive and the commitment less complete. See Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L.Rev. 263, 287-88 (1937); Prosser, *Torts* § 126 at 1018 (3d ed. 1964). In law enforcement, for example, the jurisdictional question is often answered simply by whether the officer was wearing his badge or purporting to act in the name of the government. Its resolving power will pick up a policeman claiming privilege for unwarranted public statements, see *Colpoys v. Gates, supra,* but completely miss the much more serious and common abuses like false arrest and brutality. See *Norton v. McShane, supra.* In particular, unconstitutional searches and seizures by definition have "more or less connection with" law enforcement and are made in the "line of duty". If *Vilas* and *Barr* furnish the standard for executive privilege, wilful violation or disregard of constitutional rights is privileged conduct and nothing remains of the rights recognized in *Entick v. Carrington, supra,* and the enforcement of the Fourth Amendment intended by the framers.

Apart from the misreading of the *Vilas* and *Barr* decisions, the law on executive privilege is fairly well established not only by the older cases in trespass, see *Mitchell v. Harmony, supra; Bates v. Clark, supra;* Restatement (Second) of Torts § 214(1)(1965); Harper & James, *The Law of Torts* § 1.20

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[10]The *Vilas* test was notably not quoted in Mr. Justice Harlan's opinion in *Barr* which emphasized "the duties with which the particular officer . . . is entrusted", 360 U.S. at 573. But the *Barr* standard of "beyond the outer perimeter of line of duty" has been equally misunderstood as a jurisdictional test.

at 57 (1966), but by this Court's recent decision in *Pierson v. Ray*, 386 U.S. 547 (1967). The complaint in *Pierson* sought damages under 42 U.S.C. § 1983 from a judge and police officers for false arrest and imprisonment. This Court reaffirmed the doctrine of judicial immunity recognized in *Bradley v. Fisher, supra*, but pointed out that the common law "has never granted police officers an absolute and unqualified immunity". 386 U.S. at 555. Looking at the officer's discharge of his duty rather than whether he was wearing his badge, the Court held that a policeman who reasonably believes an arrest is valid is not liable for false arrest simply because the suspect is in fact innocent or the statute being enforced is later held unconstitutional. *Ibid.*

The privilege recognized in *Pierson* is sufficiently broad to shield an officer from liability for a search and seizure that he reasonably believes valid even though it is later held unauthorized or unconstitutional.[11] That is all the protection the officer can reasonably claim and it is all society can afford to give. To give more, to shield a warrantless search and seizure where no extenuating circumstances otherwise render it reasonable, would be tantamount to extending the defense of *Pierson* to an arrest without probable cause or under a statute definitively adjudicated unconstitutional, thus establishing the "absolute and unqualified immunity" which this Court specifically denied. Such an arbitrary interference with liberty and property cannot be privileged. This is not because it lacks "more or less connection with" law enforcement or is not in the "line of duty" but because, being a clear violation of constitutional rights and manifestly beyond the scope of authority, it cannot be justified as rea-

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[11] Whether the privilege would withstand an allegation of malice is not at issue here since no malice was alleged. But an impressive number of lower court decisions have regarded the *Vilas* shield against inquiring into motives as not limited simply to defamation. See, *e.g.*, *Gregoire v. Biddle, supra* (L. Hand, J.); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (2d Cir. 1962) (Medina, J.) *cert. denied*, 374 U.S. 827 (1963).

sonably believed authorized or necessary to the effective discharge of duty.

When the government claims in open court that vigorous law enforcement requires immunity for officers who have wilfully violated constitutional rights, it is time to return to first principles on which our legal system was founded. Obviously law enforcement could be pressed more vigorously without the fear of liability. But here enforcement collides with other, higher values—with the constitutional command that the right to be secure from unreasonable searches and seizures shall not be violated. When that command is ignored, the "dominant interest of the sovereign is then on the side of the victim" who may bring an action to vindicate his rights. *Land v. Dollar*, 330 U.S. 731, 738 (1947). In such an action, it is well to recall that no claim of immunity was or could have been raised in *Entick v. Carrington, supra*, and to recognize that a privilege shielding wilful violation of the Constitution would effectively nullify the rights established by *Entick* and intended by the framers to be secured by the Fourth Amendment.

CONCLUSION

The order of the court of appeals should be reversed.

Respectfully submitted,

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Counsel for Petitioner

September 1, 1970.

IN THE

Supreme Court of the United States

OCTOBER 1970 TERM, NO. 301

WEBSTER BIVENS,

Petitioner,

—v.—

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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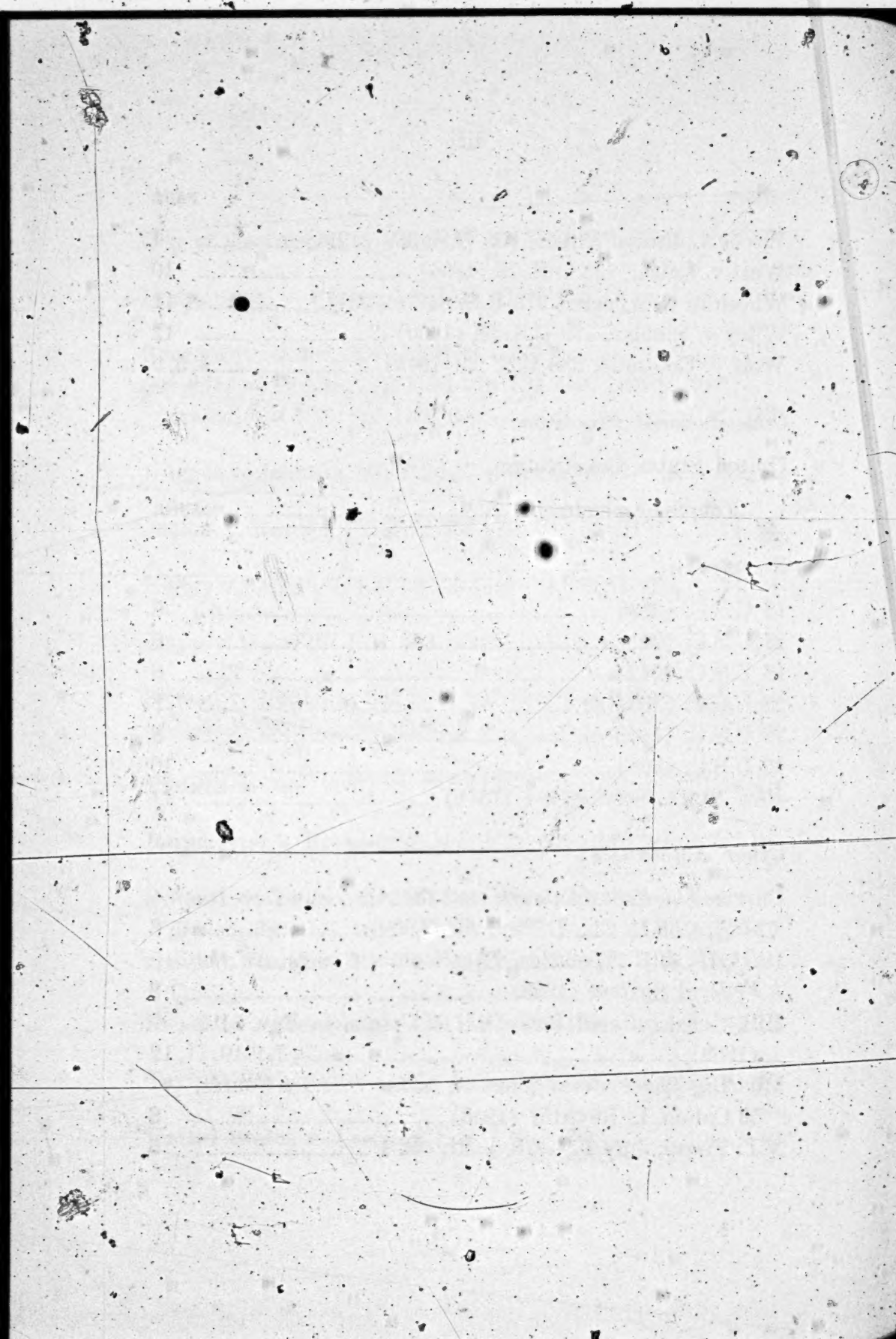

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Interest of Amicus

The American Civil Liberties Union is a nationwide, non-partisan organization whose goal is to safeguard and defend those constitutional liberties guaranteed in the Bill of Rights. Toward that end, the Union has been concerned for fifty years not only with the declaration and definition of constitutional principles but also with the implementation and protection of such constitutional rights, including the rights of personal security and privacy bottomed in the Fourth Amendment.

This case directly raises serious issues about the manner of assuring the availability of the personal liberties afforded by the Fourth Amendment to the United States Constitution. In addition, the resolution of the issues raised in this case may affect the implementation by appropriate remedies of other constitutional safeguards as well. For both reasons, the American Civil Liberties Union views this case as an important one which has wide-reaching consequences in terms of both the continuing vitality of the Fourth Amendment and the accountability of federal officers for their unconstitutional conduct.*

Statement of the Case

A writ of certiorari issued in this case to review the affirmance, by the United States Court of Appeals for the Second Circuit, of the dismissal of the complaint by the United States District Court for the Eastern District of New York. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 409 F.2d 718 (2d Cir. 1969).

In brief, petitioner complained that the defendants, "acting under the colors and authority of the United States of America" (Complaint, para. 2), conducted a forcible and unreasonable search of petitioner's apartment, and arrested petitioner with neither a search warrant nor an arrest warrant. Petitioner's family observed all of this, and he claimed great humiliation, embarrassment, and mental suffering (Complaint, para. 8) as a consequence of the search and arrest and prayed for damages of $15,000 against each Agent.

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* Letters of consent to the filing of this brief from counsel for petitioner and for respondents are being submitted to the Court.

The district court granted a motion to dismiss for failure to state a claim upon which relief could be granted and for lack of jurisdiction over the subject matter. The Court of Appeals rejected the conclusion that the district court lacked jurisdiction but affirmed for failure to state a claim. In so doing, it held that, in the absence of an Act of Congress additional to that establishing the district court's general federal question jurisdiction, one may not maintain in federal court a claim for money damages as a consequence of deprivation of Fourth Amendment rights by persons acting under federal authority. Having ruled on that ground, the court found it unnecessary to consider the additional claim, raised by the government and accepted by the district court, that the defendants were immune from suit, so as to require dismissal on the face of the complaint.

In holding that "the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure," 409 F.2d at 719, the court below relied on its reading of the history of the Fourth Amendment, its view that a federal damage remedy is not essential to safeguarding Fourth Amendment guarantees, and its belief that judicial economy would not be served by allowing such suits. These rationales have been criticized by at least one noted scholar of judicial federalism. See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1149-55 (1969).

For the reasons set forth herein, *amicus* submits that this Court should recognize and afford the remedy of a federal damage action to redress brazen violations of the interests protected by the Fourth Amendment.

I.

This Court should affirm the existence of a federal cause of action to remedy by damage a deprivation of rights secured by the Fourth Amendment to the United States Constitution when such deprivation is effected by persons acting under color of federal authority.

It is the view of the American Civil Liberties Union that additional legislation is unnecessary for the maintenance of this action as a purely federal one. Rather, this Court should hold, as it has in the case of injunctive relief, see *Bell* v. *Hood*, 327 U.S. 678, 684, n. 4 (1946), that the right to the remedy of damages for deprivation of the constitutional right stems directly from the provisions of the Fourth Amendment.

A. *Recognising This Type of Damage Action Is Essential to Protecting Fourth Amendment Interests*

The recent history of the Fourth Amendment has been preoccupied with the question of remedies for its breach. The primary controversy has been over whether the remedy of an exclusionary rule, fashioned by "judicial implication," *Wolf* v. *Colorado*, 338 U.S. 25, 28 (1949), and long-applicable in federal criminal prosecutions, see *Weeks* v. *United States*, 232 U.S. 383 (1914), was sufficiently important to the scheme of the Fourth Amendment so as to require its application to state prosecutions as well.

The ultimate resolution of this constitutional dispute turned in large part on this Court's altered view of the viability of other remedies for safeguarding Fourth Amendment rights against official lawlessness. The ma-

jority opinion in *Wolf* v. *Colorado, supra,* in refusing to hold the exclusionary remedy to be constitutionally required, remanded those whose rights had been infringed to "the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford." 338 U.S. at 31. The dissenters in *Wolf* warned that these alternative remedies were illusory. The experiment with other remedies, under the regime of *Wolf* v. *Colorado,* proved to be spectacularly unsuccessful. Thus, in *Mapp* v. *Ohio,* 367 U.S. 643 (1961) this Court observed that the other remedies had been "worthless and futile" and held that the remedy of exclusion was required by the interests embodied in the Fourth Amendment.

The effectiveness of the exclusionary rule does much to implement the Fourth Amendment's commands. But that remedy cannot be realized unless a criminal prosecution is ultimately undertaken against the victim of a Fourth Amendment intrusion. Conversely, the exclusionary rule is no guarantee of the rights of those who are not prosecuted. And it is of small value to those persons subjected to intentionally outrageous intrusions on their privacy, even though evidence may ultimately be suppressed and criminal prosecutions terminated. There are groups in our society who have been the victims of police harassment in such situations.[1]

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[1] Several months ago, following police raids of Black Panther offices in Chicago and Los Angeles, the American Civil Liberties Union surveyed police harassment in various metropolitan areas. ACLU affiliates reported persistent incidents of constitutional violations. At least one raid involved federal law enforcement officials. ACLU *News Release,* Dec. 24, 1969, PR 51-69.

This is hardly surprising since FBI Director Hoover has branded the Black Panthers the "most dangerous and violence prone of all extremist groups." *N.Y. Times,* July 14, 1970, p. 21, cols. 1-2.

Unless this Court can assure itself that there is no possibility that federal law enforcement officials will engage in violations of the Fourth Amendment for purposes of harassment or other motives unrelated to *bona fide* prosecution, there is a need for an effective remedy apart from the exclusionary sanction.

In all of those situations where the exclusionary remedy is no deterrent to or little satisfaction for a violation of Fourth Amendment rights, the other forms of redress are as unsatisfactory now as they were a decade ago when *Mapp* was decided. Criminal prosecution of offending officers, although authorized by 18 U.S.C. section 2236, is rarely invoked, as the annotations to that section testify. The use of 18 U.S.C. sec. 241 or 242 against federal officials is similarly unlikely.

As to the hortatory appeal to internal police discipline "under the eyes of an alert public opinion," this too seems an illusory recourse in this era of public concern for "law and order."

While injunctive, and presumably also declaratory relief, is theoretically available, see *Bell* v. *Hood, supra,* the target of an excessive violation of Fourth Amendment rights is hardly likely to be aware of the planned action before it is consummated. And rarely will such an individual be able to sufficiently demonstrate a pattern of official conduct to persuade a court to enjoin future invasions of his privacy.

The final remedy available to redress severe infringements of the Fourth Amendment by federal officers is a common law damage action. It was the supposed availability of this remedy which prompted the court below to

conclude that there was no need to allow damage actions in a federal forum. But constitutional rights should not be denied federal enforcement merely because the same conduct might give rise to common law liability. See Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1118-22 (1969). Moreover, for reasons more fully set forth *infra,* part B, suits such as these have so many dimensions which are uniquely federal in nature, that they are best resolved by federal tribunals. Had the Fourth Amendment never been written, exclusive recourse to the traditional common law remedy of trespass actions might be understandable. But the Fourth Amendment was written and made an essential ingredient of our Constitution. It has long been used as a barrier to oppressive and overreaching conduct by federal law enforcement officials. The rights asserted herein are uniquely bottomed upon the spirit and language of that Amendment. When asserted against federal officers, there are compelling reasons to make a federal forum available for their vindication.

B. *The Federal Courts Are the Proper Forum for Litigation of This Type*

While the main issue in this case might seem self-contained, there is an important aspect of this case which was not considered by the Court of Appeals. That is that this action is cognizable in the federal courts irrespective of whether ~~the remedy~~ is afforded directly by the Fourth Amendment. The complaint properly alleges jurisdiction under 28 U.S.C., Section 1331(a), and properly states, as an issue necessary to be decided, the claim that a search was conducted without warrant in violation of constitutional rights. Plaintiff's right to relief, whether the cause of action is ultimately based on state trespass

law or directly on the Fourth Amendment, depends upon a pure issue—whether defendants violated the Fourth Amendment of federal law. Accordingly, whatever view this Court takes of the claim for a purely federal remedy, this action "arises under the Constitution . . . of the United States" as Section 1331(a) has been interpreted by this Court. See *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); H. Hart & H. Wechsler, *The Federal Courts and the Federal System*, pp. 763-69 (1953); *Wheeldin* v. *Wheeler*, 373 U.S. 647, 659 (1963) (opinion of Brennan, J.); Mishkin, *The Federal Question in the District Courts*, 53 Colum. L. Rev. 157, 166 (1953). Under *Smith*, whenever it appears from a complaint that the plaintiff's claim for relief, even if partially grounded on state law, depends also upon the construction or application of federal law so that a favorable construction or application is necessary for relief, jurisdiction exists under Section 1331(a). Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 268, 276-79 (1969). As a consequence, even if the courts below correctly denied the existence of a purely federal remedy, the dismissal was inappropriate. Rather, the question also had to be answered whether a sound claim of violation of the Fourth Amendment was stated and, if so, whether such a violation entitled the plaintiff to a damage remedy under the applicable state law of trespass or tort.

This point is significant for several reasons. It can be expected that most such claims will be brought in the district courts.[2] It needs little citation to establish that

[2] An additional ground for such cases to come into federal courts is 28 U.S.C. Section 1442, providing for removal by federal officers. Of course, this gives the federal defendant a choice of forums which the plaintiff does not have.

the availability of a federal forum of first instance is often considered crucial by counsel for parties complaining of deprivation of constitutional rights. Cf. *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966); *Georgia* v. *Rachel*, 384 U.S. 780 (1966). Accordingly, given the fact that the question of federal law controls plaintiff's right to relief, and that the defendants are federal officials, a state's interest would be minimal at best; and anticipating that most such cases will be tried and decided in federal courts, there seems little reason to let the incidents of such actions be *controlled* by state law.

These factors make the normal considerations of comity which ordinarily lead to caution in framing or expanding federal remedies for federal rights, see *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), irrelevant in this instance. Additionally, they make spurious the issue of whether a damage action *should* lie for federal officers' deprivation of constitutional rights. A damage action already lies in the law of trespass and tort and it lies in the federal courts for the reasons set forth above. The only serious issue is whether state law should be permitted to supply the standards for recovery and defenses to recovery.

Several reasons militate against the conclusion that state law should control the incidents of such actions where, as here, the state's interest is minimal. The first of these is that the power to define standards and defenses is actually the power to nullify the remedy. This Court has already concluded, in another context, that state remedial systems had rendered the Fourth Amendment a mere "form of words," *Wolf* v. *Colorado*, 338 U.S. 25, 42 (1949) (dissent). See *Mapp* v. *Ohio*, 367 U.S. 643 (1961); see also A. Hill, *Constitutional Remedies*, 69 Colum. L.

Rev. 1109, 1153 (1969). Thus, this Court should be hesitant to increase the power of the states to limit available remedies for Fourth Amendments rights by narrowing the bases for recovery in damage actions.

Secondly, it is only the conduct of federal officials which this action seeks to circumscribe. A purely federal remedy, arising from the Constitution itself, need not supplant or even supplement the already existing federal statutory remedy for deprivations by state officials. See 42 U.S.C. Section 1983. Moreover, no purpose is served by having the responsibilities of federal officers for violating the federal Constitution turn on the law of numerous jurisdictions which might apply widely differing rules as to standards and defenses.

Additionally, if this Court does declare a purely federal cause of action and undertakes to define all of the appropriate standards and defenses, it would be undertaking a task substantially similar to that performed by it in many other contexts. The Court of Appeals, in support of its position, argued that a federal court should not undertake to assume the "responsibility for developing a body of federal common law governing such questions as the types of damages recoverable, the types of injuries compensable, the extent to which official immunity is available as a defense, and the degree of evil intent which is necessary to state a meritorious cause of action" 409 F.2d at 726. That is exactly the task, however, which the federal courts have performed under 42 U.S.C. Section 1983, which provides nothing in the way of standards or defenses. See, *e.g., Pierson* v. *Ray,* 386 U.S. 547 (1967). Indeed, rules developed under that statute might provide an appropriate model. Moreover, in *West* v. *Cabell,* 153 U.S. 78

(1894), in which this Court sustained an action for damages as a consequence of a federal arrest violative of the Fourth Amendment, the applicable statute provided no help. It merely said that "in case of a breach of the conditions of a marshal's hand, any person thereby injured may institute in his own name and for his sole use suit on said hand and thereupon recover such damages as shall be legally assessed. . . ." Rev. Stats. Section 784 (1878). The statute was silent as to provisions of the hand, and provided nothing further about the circumstances under which one might recover damages for a marshal's misconduct. Nevertheless, this Court sustained the action and in so doing charged the federal courts with responsibility for developing appropriate rules. The process of declaring a federal common law is obviously not a new one for this Court, see, *e.g.*, cases collected in *Wheeldin* v. *Wheeler*, 373 U.S. 647, 664 n. 12 (1963), and one which this Court has in the past considered it appropriate to undertake despite the lack of constitutional necessity to do so. See, *e.g.*, *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). It is as appropriate in this case, in which the constitutional language forms the textual source, as it is when statutory language, not providing the remedy sought, is the source. See, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947). See also, A. Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118-1122 (1969).

Moreover, there is no question that this Court has the power to declare the existence of a constitutional remedy arising from the Fourth Amendment. Certainly, the holding in favor of jurisdiction in *Bell* v. *Hood*, 327 U.S. 678 (1946) implies such power. See also, *Swafford* v. *Temple-*

ton, 185 U.S. 487 (1902); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900). Cf. *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963). The Constitution has often been the direct source of remedies applied by this Court. See, *e.g., United States* v. *Lee,* 106 U.S. 196 (1882). As Professor Hill has recently pointed out, the declaration of a constitutional damage remedy is less disruptive of our constitutional scheme than other remedies because it does not have a necessary impact on the government, and therefore it is least violative of the sovereign immunity of the United States, Hill, *Constitutional Remedies, supra,* 1146-48. Accordingly, the position of the majority of the Court of Appeals that the federal courts should not establish constitutional remedies because Congress has not acted to implement a particular provision of the Constitution ignores the role of the courts in giving meaning and effect to constitutional language.

The ACLU believes that the sanction of personal financial responsibility is of prime importance in protecting individuals against excessive use of federal authority. For the reasons above, this Court should hold that the Fourth Amendment itself provides that, in appropriate cases such as this, its breach must be redressed by damages.

II.

No doctrine of official immunity supports the dismissal of the complaint in this action.

The American Civil Liberties Union is committed to the view that personal accountability of government officials, in the form of damage actions, as well as criminal responsibility, is one of the most valuable tools which society possesses to limit overzealous government officials' infringement of personal liberties. For that reason, the ACLU believes that the majority position in *Barr* v. *Matteo*, 360 U.S. 564 (1959), declaring an absolute privilege for government officials, acting within the scope of office, should be reconsidered and the Court should adopt the kind of qualified privilege rule urged by the dissents of Chief Justice Warren and Mr. Justice Brennan in that case. A qualified privilege, involving good faith belief by the government official that his action is consistent with his office and the United States Constitution, is harmonious both with the principle of personal accountability and with the broadest justifiable freedom of action for government officers. Conversely, the absolute privilege does not balance personal responsibility against governmental freedom, but simply relegates the former to irrelevancy in the most important instances. See *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). As such, the rule of *Barr* v. *Matteo* deviates seriously from settled principles of accountability. See, *e.g.*, *Wheeldin* v. *Wheeler*, *supra*, at 656 and cases cited.

Moreover, when dealing with the kinds of official misconduct alleged here, the federal courts have not applied the absolute privilege approach of *Barr* v. *Matteo* when

the defendants are state officers. In cases of this type brought under the Civil Rights Act, state law enforcement officers enjoy no absolute freedom from liability, but rather are subject to suit, although they may assert a defense based on good faith *and* probable cause. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Joseph* v. *Rowlen*, 402 F.2d 367 (7th Cir. 1968).

Similarly, many federal courts have allowed only a qualified privilege in suits such as this, which complain of conduct by federal officials in violation of the Fourth Amendment. Thus, for example, in *Hughes* v. *Johnson*, 305 F.2d 67 (9th Cir. 1962), a suit against federal game wardens, the court discussed *Barr* v. *Matteo*, observing:

> Our problem at this point does not relate to the malicious performance of official duties. The question is whether a search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view, it cannot and accordingly immunity does not extend to such conduct. 305 F.2d at 70.

Accord, Allen v. *Merovka*, 382 F.2d 589 (10th Cir. 1967). Similarly, in *Kelley* v. *Dunne*, 344 F.2d 129 (1st Cir. 1965), Chief Judge Aldrich, after a careful analysis of the policies involved in determining an appropriate immunity rule in cases such as this, distinguished *Barr* as follows:

> Applying these principles to the cases at bar there would seem a substantial difference between a public information officer uttering a defamatory statement in the course of an official announcement, for example,

> and a postal inspector making a search without, so far as presently appears, consent or a warrant or belief that there was a warrant, and volunteering slander. The public need to protect such conduct, or conduct difficult to separate therefrom, is minimal. 344 F.2d at 133.

The court saw no reason to accord federal law enforcement officials an immunity which state officials would not have.

Cases such as these reflect the implicit realization that there are really two issues involved in the immunity question: first, when should a suit be allowed against a governmental official, and, second, what defenses should be available. The analysis in *Barr* v. *Matteo* is apposite only to the first issue and represented a concern for insulating policy-making officials from vexatious lawsuits which, in the aggregate, might inhibit fearless planning of the public business. No such countervailing interest is involved in protecting the kind of patently unconstitutional conduct alleged here, so similar to that alleged in *Monroe* v. *Pape*. Consequently there should be no immunity from suit. See, *Kelley* v. *Dunne, supra; Hughes* v. *Johnson, supra.* As to the second issue, in suits challenging violations of the Fourth Amendment, the mode of analysis should be drawn from *Monroe* and *Pierson*. In *Pierson*, the Court observed that the traditional common-law rule of tort liability afforded police officers the defense of "good faith and probable cause" when sued for false arrest or imprisonment. 386 U.S. at 555-57. That same qualified privilege was held available in suits brought under the Civil Rights Act. Moreover, when an arrest is made without a warrant and without probable cause, good faith is irrelevant. See *Joseph* v. *Rowlan, supra.*

Amicus submits that the same standard should be applied to the conduct of federal law enforcement officials. No principle of federalism requires that federal officers in federal courts should be granted greater protection. Indeed, for the reasons set forth in part IB *supra*, and because the prohibitory commands of the Fourth Amendment operate directly on federal officials, it would be anomalous to afford a federal policeman greater freedom from liability for the same conduct which would render state officials liable in damages.

Even more pertinent to the present case, however, is the fact that in the procedural context of this case the immunity issue cannot be reached. The complaint attempts to plead unconstitutional action by the defendant agents in excess of their authority. The motion for summary judgment neither adds nor subtracts anything. There are no other pleadings or affidavits in the record. It is established principle under *Barr* v. *Matteo*, *supra*, that the doctrine of immunity comes into play only at the instance of a government official who acted within the scope of his authority. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (majority opinion). The complaint pleads no facts from which action within lawful authority could be found, unless "scope of authority" included everything but purely personal gambits. That is so even if, under some circumstances, a government official can act in violation of the Constitution and still be within the scope of his office.

The federal courts have been extremely reluctant to afford immunity without a detailed showing, by affidavit or otherwise, that the defendants' conduct was within the scope of his official duties. See, *e.g.*, *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *Chafin* v. *Pratt*, 358 F.2d 349 (5th Cir.), *cert.*

denied, 385 U.S. 878 (1966); *Scherer* v. *Brennan*, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967). Requiring some demonstration of authority will hardly deter law enforcement officials from performing their legitimate responsibilities. And it will insure that redress will be available where as here authority has been unconstitutionally exceeded.

Therefore, if this Court decides to reverse on the first question, there is no basis on which it could find for respondents on the second. Rather, it should remand the entire case. Hopefully, the Court will remand with instructions to consider the applicability of a limited, rather than absolute, immunity rule, and to require some showing by the defendants to support such an immunity.

CONCLUSION

The decision of the Court of Appeals should be reversed and the judgment of dismissal vacated, and this case should be remanded to the district court for further proceedings.

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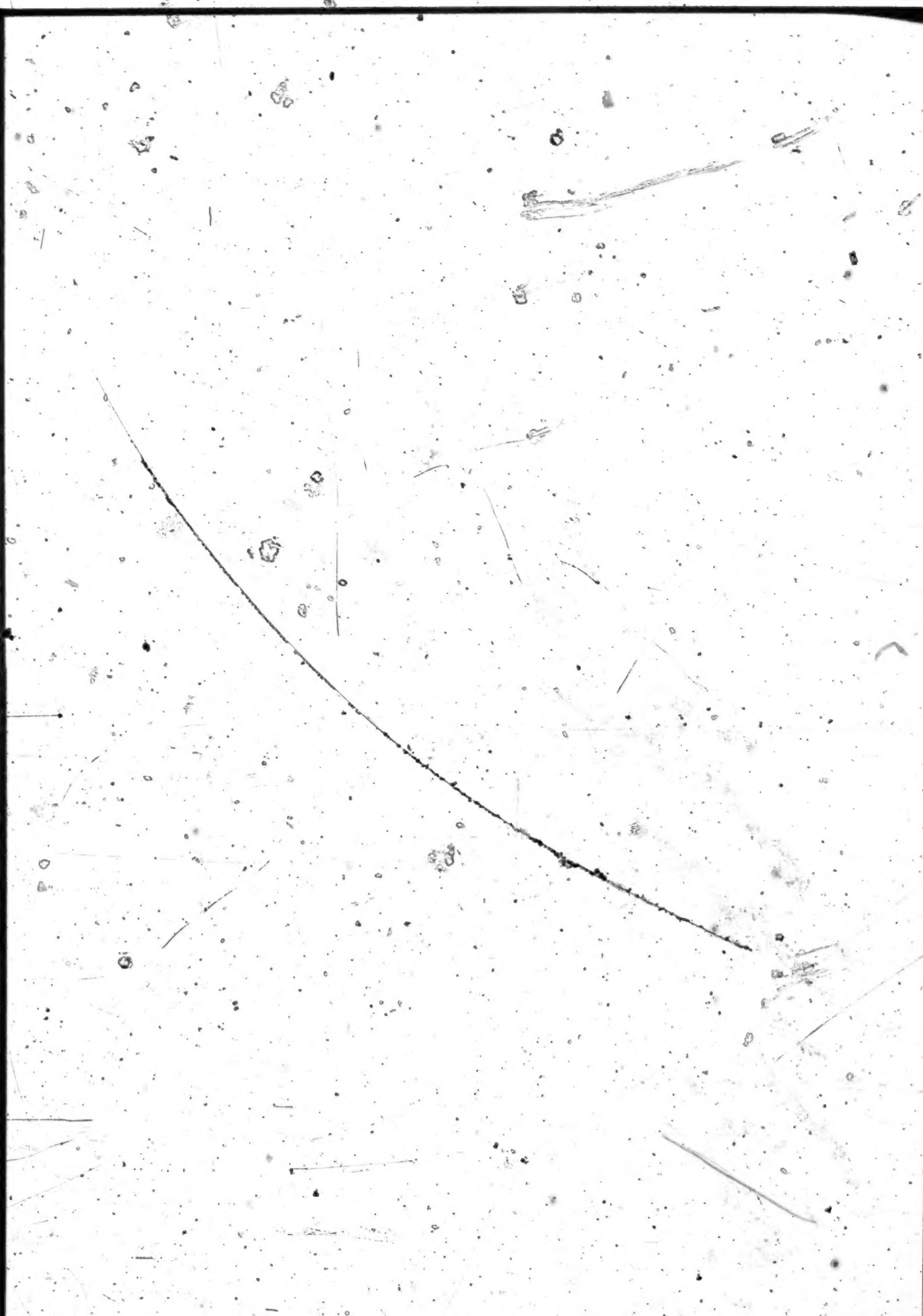

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v.

SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (App. 35–40) reaffirming its initial memorandum and order dismissing the complaint (App. 34) is reported at 276 F. Supp. 12. The opinion of the court of appeals (App. 44–59) is reported at 409 F. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1969 (App. 61). The petition for a writ of certiorari was filed on May 12, 1969, and granted

on June 22, 1970, 399 U.S. 905. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's allegation that federal officials violated his Fourth Amendment rights states a federal cause of action for damages.

STATEMENT

This is an action for money damages brought by petitioner, acting *pro se,* in the United States District Court for the Eastern District of New York against federal narcotics agents.[1] The district court granted the agents' motion to dismiss and the court of appeals affirmed. Petitioner's complaint and his affidavit filed in support of a motion for summary judgment contained the following allegations:

> Six federal narcotics agents, "acting under color of authority of the laws of the United States," forced their way into petitioner's apartment and arrested him "for violation of narcotic laws" (App. 1, 28). The agents then searched his apartment in an unreasonable manner (App. 2); the search and arrest were made "without cause, consent or warrant"

[1] The apparent contradiction in the title of this case—"Unknown Named"—arises from the fact that after petitioner filed his complaint, the United States Attorney supplied the clerk of the court with the agents' names. However, as the summonses and their returns indicate, only five agents are apparently involved (App. 5–24), rather than six as stated in the case title.

(App. 28). The agents "used unreasonable force" in effecting the arrest (App. 1–2), and, in particular, "manacled" petitioner in the presence of his family and threatened them with arrest (App. 2). Petitioner was then booked at the "Federal Narcotic Bureau, 90 Church St., New York City" (App. 2), presumably in connection with this arrest.

Petitioner claimed the arrest and search caused him "great humiliation, embarrassment, and mental suffering" and sought $15,000 in damage from each of the agents (App. 2).

Neither the complaint nor the affidavit set forth any details about the entry into the apartment and the arrest.

The district court granted the agents' motion to dismiss on the grounds that federal officials acting in the performance of their duty are immune from suits for damages, and that the complaint presented no federal question upon which relief could be granted under 28 U.S.C. 1331 (a) (App. 37–40).

The court of appeals, in affirming, held that the Fourth Amendment itself does not create a federal cause of action for damages arising out of an unreasonable search and seizure. The court reasoned that statutory authority is a prerequisite for such a federal remedy even though the wrong complained of is the violation of a constitutional right. While the court recognized that federal remedies have been implied from certain constitutional prohibitions, the controlling circumstances found to exist in those cases were

not present in the instant case because existing remedies for an unconstitutional search and seizure substantially vindicate the interests protected by the Fourth Amendment. (App. 52–58.) Thus, the court refused to depart from the traditional rule that the ways and means of enforcing constitutional rights should be left to Congress. (App. 59.)

SUMMARY OF ARGUMENT

I.

A. The Fourth Amendment had its genesis in the successful common law actions in trespass prosecuted in England against government officers who offered the defense of justification by reason of a general warrant. The English courts disallowed the defense by holding the warrants void. These cases indicate that the purpose of the Fourth Amendment was to insure that similar defenses would be disallowed in state common law actions. The fact that no general federal question jurisdiction was granted to the lower federal courts confirms that the Fourth Amendment was intended to affect only the defense in suits under state common law, not to create a wholly new federal tort action.

B. Implementing constitutional rights by adopting affirmative remedies for their breach has traditionally been considered a legislative function. The only cases that might be viewed as instances where the Court has performed that task are cases where no other remedy for vindicating the constitutional right was available.

The lack of any cases allowing a federal damage remedy under the Fourth Amendment is simply a manifestation of the general understanding of the Court's role in this regard and of the history and language of the Fourth Amendment, which indicate that state law governs the cause of action.

In the absence of implementing legislation, new remedies for enforcing constitutional rights should not be devised by the Court unless there is a compelling need for them. Decisions inferring rights of action from federal statutes require some showing of need as a prerequisite. When the Constitution is the only source for the new remedy, a significantly greater showing of necessity is required. Many different kinds of remedies for implementing the Constitution are available and choosing among them is a delicate task. Since the Court's range of choice is limited as compared with Congress', the decision to create a federal damage remedy should not be reached unless that remedy is essential for the protection of Fourth Amendment rights. The basis for judicial creation of the exclusionary rule under the Fourth Amendment serves as a guide in this respect.

C. Although state tort law may not effectively control police practices, a federal damage remedy would fare no better because the factors that render state law ineffective would apply equally to a federal remedy. The potential litigant's fear of antagonizing the police, together with unsympathetic juries, judgment proof defendants, and other factors, give the damage remedy little deterrent force. This is confirmed by experience

under 42 U.S.C. 1983, which allows civil suits against state officers for violating the Fourth Amendment. Although some of these difficulties might be cured by establishing minimum liquidated damages and allowing suits directly against the government, these are matters for Congress rather than the courts. When there has been a significant gap in state law Congress has filled it, as indicated by the enactment of 18 U.S.C. (Supp. V) 2520, allowing recovery of liquidated damages for illegal wiretapping or electronic eavesdropping even when accomplished by nontrespassory means.

Generally, state law adequately compensates the victim of an unlawful search or seizure for his injuries. Thus, had petitioner sued under New York law, the common law actions of trespass and false imprisonment would have provided him with an adequate basis for seeking relief.

Aside from actual physical injuries, the measure of damages for the deprivation of civil rights is uncertain and perhaps the only solution, aside from establishing minimum levels of recovery, is to give juries wide latitude in these matters. But this is essentially what state law does.

There is no void for this Court to fill by creating a federal damage remedy. Studies indicate that suits for damages are both an ineffective and unwise method of controlling the police. Since the remedy petitioner seeks does not solve the problem he perceives, it is not necessary as a matter of constitutional law for this Court to fashion a new cause of action in damages for violations of the Fourth Amendment.

D. Although the district court had jurisdiction over the claim that the Fourth Amendment gives rise to a federal cause of action in damages, it properly dismissed the complaint on the merits and was not obligated to pass on any claims under state law. Defenses raising federal issues may not be anticipated and pendent jurisdiction does not require consideration of state claims when the federal cause of action is dismissed before trial.

II.

Since the record in this case contains only petitioner's complaint, his affidavit accompanying his motion for summary judgment, and respondents' motion to dismiss, an informed judgment on the issue of official immunity cannot be made. Hence, if the Court determines that a federal cause of action has been stated, the case should be remanded to the district court for further development of the record.

ARGUMENT

The primary question in this case—and the only one we think it appropriate for this Court to decide (see point II below)—is whether federal law authorizes a suit for damages suffered as a result of a search and seizure by federal officers in violation of the Fourth Amendment. No federal statute permits such a suit. Petitioner contends, however, that such a right of action should be implied because (1) the framers of the Constitution so intended and (2) it is necessary in order to implement the Amendment since existing procedures and remedies are inadequate either to insure

its enforcement or to provide victims of its violation with adequate redress.

The first argument rests on a misreading of constitutional history. The second argument fails to take account of the extremely limited circumstances under which this Court has been willing to create a right of action for damages based on violations of constitutional rights where Congress has not seen fit to provide that method of enforcement. The Court has created such a right of action only in the unusual situation where, unless this were conferred, there would be no effective method of protecting the rights the particular constitutional provision provides. As we contend below, effective implementation of the Fourth Amendment's guarantee against unreasonable searches and seizures does not require the existence of a federal cause of action for damages.

I.

A FEDERAL RIGHT OF ACTION FOR DAMAGES FOR VIOLATION OF THE FOURTH AMENDMENT SHOULD NOT BE JUDICIALLY CREATED

A. THE FRAMERS OF THE CONSTITUTION DID NOT INTEND TO CREATE A FEDERAL DAMAGE ACTION FOR VIOLATION OF THE FOURTH AMENDMENT

If, as petitioner claims, the Fourth Amendment was indeed intended to create a federal damage remedy, this case would nearly be ended: there would be little, if anything, for the Court to "create." But this view ignores the historical background of the Amendment and the obvious purpose its framers intended it to serve.

In the latter half of the seventeenth century Chief Justice Hale wrote that in England a government officer could not defend a common-law action such as false imprisonment on the basis of authority under a general warrant.[2] Hale's proposition was put to a severe test when, in 1763, Lord Halifax issued, and had executed, a general warrant for the seizure of papers and persons connected with the publishing of the *North Briton, Number 45.* Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43 (1937). John Wilkes, the author of the pamphlet, along with others, quickly responded with suits in trespass against the officers who had carried out the searches and seizures. The officers defended on the basis of "special justification," that is, that the general warrants authorized their actions[3]—the same defense offered in the famous case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 95 Eng. Rep. 807 [shorter version] (1765), a trespass action triggered by another of Lord Hali-

[2] I Hale, *History of the Pleas of the Crown* 580 (American ed. 1847); II *id.* 112 ("where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant, *P. 24 Car. 1.* in the case of justice *Swallowe*, and was not a sufficient justification in false imprisonment").

Hale lived from 1603 to 1676. His *History of the Pleas of the Crown*, although ordered to be printed by the House of Commons in 1680, was not published until 1736. Holdsworth, *Some Makers of English Law*, 141 (1966 ed.).

[3] *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763); *Wilkes* v. *Wood*, Lofft, 1, 98 Eng. Rep. 489 (1763); *Money* v. *Leach*, 3 Burr. 1742, 97 Eng. Rep. 1075 (1765).

fax's general warrants issued six months before the *North Briton* affair.

In each case, the court rejected this defense by holding the general warrant void as contrary to law, and sustained substantial jury awards of damages against the offending officers.[4] These cases[5] not only led to widespread condemnation of general warrants, but also—and more important for present purposes—firmly established the principle that an unlawful warrant could not serve as a defense to a common law trespass action.

Against this background of English law, which remained vivid in the minds of the Framers,[6] it is not at all surprising that there is nothing in the Fourth Amendment to indicate that a new, *federal* cause of action for damages was being created. In America, as in England, government officers were to be subject to the same common-law actions for damages as those applicable to private persons. And the Fourth Amendment insured that when the Amendment's proscriptions

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[4] Wilkes recovered £1000; the awards to other plaintiffs ranged from £200 to £400. The defendants in *Huckle* v. *Money*, *supra*, claimed the verdict of £300 was excessive and moved for a new trial. But Chief Justice Pratt, later Lord Camden, although noting that £20 might have been sufficient, sustained the jury's award of exemplary damages on the basis that the "tyrannical and severe manner" in which the King's counsel and the Solicitor of the Treasury had insisted on the legality of the warrants justified the jury's response. 2 Wils. K.B. at 206–207, 95 Eng. Rep. at 769.

[5] Together with Colonial experience with the writs of assistance, see Lasson, *supra*, at 51–78.

[6] *Boyd* v. *United States*, 116 U.S. 616, 625.

had not been followed, the officers would be precluded from justifying an infringement made actionable by *state* common law.[7]

If the intention were otherwise—if a new federal action for damages were contemplated—it is difficult to understand why the lower federal courts were given no power over cases arising under the Constitution.[8] On the other hand, if the purpose of the Fourth Amendment was to foreclose the defense of justification in common law actions there was good reason for trying such cases in state courts. The right of action would be governed by state common law and although the Fourth Amendment would determine the federal officer's defense, it could be assumed that state courts would be alert to invalidate any unconstitutional exercise of federal power against the citizens of their state.[9]

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[7] This is confirmed by the very wording of the Fourth Amendment, which as Lasson, *supra*, at 100, n. 77, observes, "did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed."

[8] Congress did not confer general federal question jurisdiction until 1875. Act of March 3, 1875, § 1, 18 Stat. 470. See Frankfurter and Landis, *The Business of The Supreme Court* 65 (1928).

[9] Indeed the history of section 5 of the Act of March 3, 1863, 12 Stat. 756, which allowed federal officers to remove from state to federal court, suits "for any arrest or imprisonment made, or other trespasses" under color of federal law, indicates Congress' concern that the state courts might go too far. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 808–810 (1965).

It should be remembered that federal officers "must act within the states," *Tennessee* v. *Davis*, 100 U.S. 257, 263, that most of the colonial courts steadfastly refused to grant general writs even after England authorized them in the Colonies, Lasson, *supra*, at 72–73, and that state fears of federal power prompted adoption of the Bill of Rights after the Constitutional Convention had failed to provide one, Dumbauld, *The Bill of Rights* 4–50 (1957). In these circumstances the framers could hardly have intended by implication to create a situation in which federal officers would be held to account, in their dealings with citizens of a particular state while acting within that state, not by the traditional common law remedies that applied to state citizens and officers, but by a new cause of action governed by federal law and administered by federal, rather than state, courts.

Thus there can be no doubt that the framers of the Fourth Amendment did not intend it to be enforced by a federal damage action and that the plan envisaged when the Bill of Rights was passed was as Chief Justice Marshall described it nearly thirty years later:

> And if the seizure be finally adjudged wrongful, and without reasonable cause, he may proceed, at his election, by a suit at common law * * * for damages for the illegal act. Yet, even in that case, any remedy which the law may afford to the party supposing himself to be aggrieved * * * could be prosecuted only in the state court. * * * Congress has refused to the courts of the Union the power of deciding on the conduct of their officers, in the execution of

> their laws, in suits at common-law, until the case shall have passed through the state courts, and have received the form which may there be given it. * * *

Slocum v. *Mayberry*, 2 Wheat. 1, 10.

B. A FEDERAL DAMAGE REMEDY FOR VIOLATION OF CONSTITUTIONAL RIGHTS SHOULD NOT BE JUDICIALLY CREATED WITHOUT A SHOWING OF UTMOST NECESSITY THEREFOR

The specific issue presented by petitioner's claim with respect to the Fourth Amendment can best be approached by initially delineating what is not involved.

First, since it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, 28 U.S.C. 1442(a), see *Willingham* v. *Morgan*, 395 U.S. 402, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court.

Second, as petitioner recognizes, the claim that existing remedies are inadequate is addressed mainly to cases where the exclusionary rule is inapplicable,[10] either because the search was fruitless or because prosecution was never contemplated.[11]

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[10] The remedy petitioner envisages, however, apparently would not be restricted to such cases.

[11] The fact that no prosecution results after a fruitful search does not mean that the exclusionary rule is not operating: the decision not to prosecute may be based on the belief that the evidence against the accused would be suppressed, thus leaving the government without a case.

Third, while it could be argued that a damage remedy fashioned under the Fourth Amendment would reach state as well as federal officers, this is of little moment because such a remedy against state officers already exists under 42 U.S.C. 1983. See *Monroe* v. *Pape,* 365 U.S. 167.

In this light we approach the precise issue in this case: whether this Court should create a federal damage remedy under the Fourth Amendment in the absence of any congressional enactment providing for such a cause of action.

1. This Court Ordinarily Has Not Enforced Constitutional Rights by Creating Causes of Action in the Absence of Implementing Legislation

(a). In nearly two centuries of constitutional adjudication the instances where this Court has sustained the awarding of damages against the federal government or its officers solely on the basis of a constitutional prohibition have been rare indeed. Petitioner points to *Wiley* v. *Sinkler,* 179 U.S. 58, and *Swafford* v. *Templeton,* 185 U.S. 487, but far from devising a new federal damage remedy for denial of the right to vote in a congressional election, those cases simply upheld federal jurisdiction without deciding the merits of the claim,[12] much as this Court did in *Bell* v. *Hood,* 327 U.S. 678, with respect to the Fourth Amendment.

Petitioner also cites *United States* v. *Lee,* 106 U.S. 196, but that case, which was an ejectment action against federal officers, has no bearing on the matter.

[12] See the court of appeals' analysis of these cases, App. 55–56.

As Mr. Justice Miller, the writer of the *Lee* opinion, explained just one year later, *Lee* was a common-law trespass action[13] where the trespassers "set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence." *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446, 452; see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696–698; 710, 716–718 (Frankfurter, J., dissenting); *Malone* v. *Bowdoin*, 369 U.S. 643, 647.[14]

The only case petitioner cites in which this Court permitted recovery of damages for violation of a constitutional right was a situation where such recovery was essential in order to make the constitutional protection meaningful. *Jacobs* v. *United States*, 290 U.S. 13, 16, held that under the Fifth Amendment a private

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[13] Of course, at the time of the *Lee* decision *Swift* v. *Tyson*, 16 Pet. 1, still held sway and there was thus no occasion for the Court to say whether this was state or federal common law. See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1132, n. 105 (1969); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 798 (1957).

[14] The *amicus curiae* relies, as did the petitioner in the court of appeals (but not in this Court), on *West* v. *Cabell*, 153 U.S. 78. That case was a suit under the bond of a federal marshall. Section 783 of the Revised Statutes required a bond to be executed before a district judge, and Section 784 authorized suit in a federal court on the bond. The case therefore provides no support for the claim that where there is no statute authorizing federal suit for damages based on an alleged violation of the Fourth Amendment, such a right of action should be judicially created.

party had a right of action against the government for just compensation for the taking of his property.[15] The language of the Fifth Amendment—"nor shall private property be taken for public use, without just compensation"—created a duty to pay and that duty implied a right to recover. In addition to the very language of the Fifth Amendment, the Court's conclusion in *Jacobs* was compelled by the fact that a contrary result would have made the Fifth Amendment's prohibition a mere abstract pronouncement—the plaintiff had no other means of redress.[16]

There are dispositive differences between *Jacobs* and this case. Unlike the Fifth Amendment, there is nothing in the language of the Fourth Amendment that contemplates any payment of money. Moreover, the victim of an illegal search and seizure has a means of redress for any damages he may suffer: state common law provides a cause of action. Indeed, unlike the plaintiff in *Jacobs,* petitioner's argument is not that he has no other means of redressing the wrongs allegedly inflicted upon him, but rather that the other means are inadequate; and the alleged inadequacy is not primarily because he would receive insufficient compensation for his injuries, but mainly because the amount he would recover may not have a sufficient deterrent effect.

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[15] Substantial doubt has been expressed about the current validity of this aspect of *Jacobs.* See *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 876–881 (1957).

[16] The alternative of bringing a common-law action of ejectment, see *United States* v. *Lee, supra,* was not open because the taking in *Jacobs* was accomplished by the government's flooding plaintiff's land.

The cases permitting federal injunctions against state officers seeking to enforce unconstitutional state statutes (see *Ex parte Young,* 209 U.S. 123) similarly turn upon the necessity for such actions to insure vindication of the constitutional rights involved. We assume that, as presently viewed, such a right of action is derived from the Constitution.[17] As Professor Hart observed, however, such suits were originally sanctioned on the theory that "an individual could be enjoined from taking action which in the absence of official justification would amount to a trespass, and that the federal question of the existence of a valid justification could thus be determined as an incident of the suit to prevent trespass." Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 523–524 (1954), citing *In re Ayers,* 123 U.S. 443, 499–506. By "almost imperceptible steps," however, the injunction remedy took on a federal character. Hart, *supra* at 524. Doubtless this trend was occasioned by the difficult problems that arose when the action sought to be enjoined would not have amounted to a state common-law tort. Still, even in such a case, the constitutionality of the state law might have been determined as a defense in an enforcement suit by the state.

But this assumes the complaining party would—and should—be willing to violate state law in order to have the constitutional issue passed upon. The difficulty was that as a practical matter this assumption had no foundation in cases such as *Ex parte Young,* where the penalties for violating the

[17] But see note 18 *infra.*

state law were so severe that the railroads would have had to comply because they could not risk the possibility of losing in an enforcement action. See Wright, *Federal Courts* 185–186 (2d ed. 1970). Thus, if cases like *Ex parte Young* had been decided the other way there would have been no realistic way for the constitutionality of the state law to be challenged and the states would have been free to ignore the Constitution's proscriptions. See Wright, *supra*, at 185. As in *Jacobs* v. *United States*, *supra*, the judicially created federal remedy under the Constitution was essential to protect against infringement of secured rights.[18]

(b). The paucity of decisions sustaining federal damage claims for constitutional violations cannot be brushed aside by petitioner's explanation that such contentions were not raised because, under traditional pleading conventions, the complaint would reveal only the state-created right of action without mentioning the Fourth Amendment, which would be drawn in issue only by way of defense. The manner in which these cases were pleaded simply illustrates the general understanding that damage actions against law enforcement officials were brought under state law—an understanding that conforms to the language and his-

[18] The court of appeals also reasoned that in those cases injunctive power was an "essential corollary to the power of judicial review" and that "even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by government officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress" (App. 52–53).

tory of the Fourth Amendment. If litigants thought the Fourth Amendment created a federal damage remedy, or were sufficiently dissatisfied with state law to make such a claim, they would have had no trouble in stating it in their complaint and would not have relied upon state law. In any event, it is difficult to see how petitioner's explanation has any force, for even today the "plaintiff is not permitted to anticipate defenses in his complaint," Wright, *supra*, at 60.

2. A Federal Damage Remedy Should Not Be Judicially Created Under the Fourth Amendment Unless It Is Essential

In some respects the issue here is similar to that in *Wheeldin* v. *Wheeler*, 373 U.S. 647, an action for damages and an injunction against a federal officer for alleged abuse of the subpoena power granted by an Act of Congress.[19] In refusing to "imply" such a cause of action from the federal statute, the Court reminded that "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted." 373 U.S. at 651. "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. * * * Federal law, however, supplies the defense, if the

[19] Neither the majority opinion, 373 U.S. at 649, nor the dissent, *id.* at 655 n. 3, dealt with the question in terms of the Fourth Amendment.

conduct complained of was done pursuant to a federally imposed duty * * *, or immunity from suit." *Id.* at 652.

The description in *Wheeldin* of the law governing damage suits against federal officers is equally applicable to suits for false imprisonment and trespass where compliance with the Fourth Amendment supplies the defense although local law governs the cause of action. This of course was the scheme envisaged by the drafters of the Fourth Amendment [20] and is hardly unusual in our federal system. See, *e.g., Howard* v. *Lyons,* 360 U.S. 593, holding that the scope of the defense of privilege accorded federal officials for statements allegedly defamatory under state law is governed by federal law; and *Barr* v. *Matteo,* 360 U.S. 564, 575, holding that the right of action of a person complaining of abuse by a federal officer acting beyond the "outer perimeter" of his "line of duty" is controlled solely by "local law" except when such a right of action is conferred by a federal statute.

Of course, "actions against federal officials * * * are necessarily of federal concern." Mr. Justice Brennan dissenting in *Wheeldin,* 373 U.S. at 664. But Congress has manifested that concern not by subjecting federal officers to a law different from that obtaining in the states where they operate, but by allowing removal to federal courts of civil actions brought against them in state courts. See 28 U.S.C. 1442(a). If Congress had thought that federal officers should be subject to a law different than state law, it would have

[20] See pp. 9–13 *supra.*

had no difficulty in saying so, as it did with respect to state officers. See 42 U.S.C. 1983; *Monroe* v. *Pape*, 365 U.S. 167, 173–174.

There is an important distinction between *Wheeldin* and this case: here a constitutional provision rather than a federal statute is offered as the basis for creating the cause of action. But with respect to fashioning a new federal damage remedy, this distinction argues for greater restraint. Cases such as *United States* v. *Standard Oil Co.*, 332 U.S. 301, and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, have indicated that a new cause of action for violation of a federal statute or implementation of a federal interest will be created where it is a "necessary supplement," 377 U.S. at 432, or "necessary or appropriate," 332 U.S. at 307.[21] In declining to create the latter type of action in *Standard Oil*, the Court stated that the fashioning of a new cause of action was for Congress, not the Court, 332 U.S. at 316–317.[22] But even though these are areas where Congress could act, the Court has not hesitated to create a remedy where the statutory scheme calls for it. Where the Court so acts, of course, Congress subsequently may approve, revise or reject what the Court has created.

When constitutional provisions are involved, however, the problem is quite different. At the least there would be substantial doubt whether Congress could

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[21] See *Wheeldin* v. *Wheeler*, 373 U.S. at 664 (dissenting opinion).

[22] This of course is also the effect of the decision in *Wheeldin* v. *Wheeler*, *supra*.

simply reject a judicially-created remedy bottomed on the Constitution;[23] a constitutional amendment might be needed for such an end. Moreover, the fact that such a remedy stems from the Constitution may give pause even if Congress considers only modification.[24]

Petitioner quotes Madison's statement that the courts will resist encroachments on constitutional rights, 1 Annals of Congress 439 (1789), and concludes the Court should act without considering the function Congress performs in this area. But as Justice Holmes admonished, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270. Of course, throughout the Nation's history this Court has performed the great function, through the exercise of judicial review, of shielding private persons against the constitutional excesses of other branches of government. But when it comes to the choice of what offensive methods should be employed to enforce constitutional rights, that is, when the Constitution is attempted to be used "as a sword instead of a shield," Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 521–522 (1954),

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[23] Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 41 n. 221 (1968).

[24] See Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1152–1153 (1969).

questions of a quite different order are raised. Compare *Wolf* v. *Colorado*, 338 U.S. 25, 28.[25]

Beyond the judicial horizon lie a whole range of devices for implementing the Constitution. See Hart & Wechsler, *The Federal Courts and the Federal System* 314 (1953). And the choice of one method, together with the permanence that inevitably attaches once the choice has been made, affects both the desirability and possibility of adopting other remedies which may be better suited to the task and perhaps less damaging to other values that also deserve protection. In sum, "All three branches of the government have responsibility for implementing the Constitution; the role of the judiciary in this regard is determined in part by the adequacy of measures and procedures instituted by the other two branches." Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 213 (1969).

Since some showing of need is a prerequisite for fashioning a right of action with respect to a federal statute,[26] a federal action for damages for violation

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[25] As the court below observed:

> The distinction between governmental and individual action drawn by the district court in *Bell* v. *Hood* has validity in the sense that the primary thrust of the Bill of Rights is to shield citizens from certain actions by the government. The implication of judicial remedies to provide this shield follows naturally from the declaration of a right; far less natural is the conversion of this shield into a sword directed against individual officers.

App. at 54–55.

[26] See Katz, *supra*, at 61–68.

of a constitutional right should not be judicially created unless this is vital to protect constitutional rights. The Court has required no less; as we have shown, causes of action under the Constitution in the absence of a statutory basis have been created only in the rare case where such a remedy was indispensable for vindicating constitutional rights.

Judicial experience with the Fourth Amendment itself supports this analysis. In *Weeks* v. *United States*, 232 U.S. 383, this Court held that evidence procured in violation of the Fourth Amendment should be suppressed in federal prosecutions. Yet the *Weeks* exclusionary rule—

> was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implementation.

Wolf v. *Colorado*, 338 U.S. 25, 28; 39–40 (Black, J., concurring). Twelve years after *Wolf*, this Court held that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendment" and hence applicable to the states. *Mapp* v. *Ohio*, 367 U.S. 643, 657.[27] Without the exclusionary rule—the "most important constitutional privilege" under the

[27] Mr. Justice Black's explanation was that "[w]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp* v. *Ohio*, *supra*, 367 U.S. at 662 (concurring opinion).

Fourth Amendment, *id.* at 656—the prohibition against unreasonable searches and seizures would be a mere "form of words," *id.* 655,[28] because of the "obvious futility of relegating the Fourth Amendment to the protection of other remedies," *id.* 652. The exclusionary rule of *Weeks,* as explained in *Wolf* and applied to the states in *Mapp,* was "the only effective remedy for the protection of rights under the Fourth Amendment." *Linkletter* v. *Walker,* 381 U.S. 618, 634. Thus, the extension of the exclusionary rule to the states, like the implication of private actions based upon the Constitution, rested on the need for such a remedy to protect the constitutional right involved.

C. A FEDERAL DAMAGE REMEDY UNDER THE FOURTH AMENDMENT IS NOT NECESSARY TO VINDICATE CONSTITUTIONAL RIGHTS

1. The Factors That Render State Tort Law Ineffective for Controlling Police Practices Would Also Apply to a Federal Damage Remedy

To establish the necessity for a federal damage remedy under the Fourth Amendment, petitioner relies heavily on *Mapp* v. *Ohio, supra.* However, the statements in *Mapp* about the inadequacy of existing remedies against state officers not only fail to support, but also substantially undercut, petitioner's claim that such a federal cause of action is essential.

Just four months before *Mapp,* the Court decided

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[28] Quoting Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392.

Monroe v. *Pape*, 365 U.S. 167, sustaining a damage action against state officers under 42 U.S.C. 1983 for violation of the Fourth Amendment. Thus, when the Court decided *Mapp* it was well aware of the availability of such suits against state officers and yet nevertheless concluded that the exclusionary rule was necessary because other remedies were inadequate. 367 U.S. at 652. Petitioner's contention that a 42 U.S.C. 1983-type remedy against federal officers is now needed because of the insufficiency of the exclusionary rule rests on the unwarranted assumption that such a remedy would be effective against federal officers; but it was in the light of the same type of remedy against state officers that the Court extended the exclusionary rule to the states.[28]

If damage suits for violations of the Fourth Amendment, such as those allowed under 42 U.S.C. 1983, were an effective means of controlling police practices, one would expect that state police would conform to the Fourth Amendment to a significantly greater extent than federal officers. But petitioner has offered nothing to show this and the situation may well be precisely the opposite. Compare Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493, 495 n. 17 (1955). In any event, the use of

[28] Petitioner's reliance on cases such as *Lankford* v. *Gelston*, 364 F.2d 197 (C.A. 4), to show that more civil remedies are needed against federal officers is misplaced. *Lankford* was a suit against state police who, apparently undeterred by the threat of damages under 42 U.S.C. 1983, had conducted more than 300 illegal searches.

42 U.S.C. 1983 to redress unlawful searches by state police apparently has been minimal.[30]

The reason is apparent. The difficulties with the damage remedy apply as much to suits under 42 U.S.C. 1983 as to suits under state law and relate not to the substantive law governing the action, but to other factors.[31] Thus,

> For one thing the average citizen is not willing to take the financial risk and trouble attendant upon litigation. Days may be lost from work, heavy expenses may be incurred in an unsuccessful suit and the recovery may be quite small. Offended citizens, especially those who are considered "police property," are often afraid of antagonizing the police for fear of retribution. Attorneys may discourage suits of this nature because they are unremunerative and because of a belief that the judges are prejudiced in

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[30] Thus, 42 U.S.C.A. 1983, notes 141, 297 and 340 (1970), list approximately 15 such cases, including *Monroe* v. *Pape*, *supra*; *Lankford* v. *Gelston*, *supra*; and the district court's opinion in this case, 276 F. Supp. 12 (E.D.N.Y.). See also Anno., 1 A.L.R. Fed. 519, 533 (1969). While there are undoubtedly a number of unreported cases and even other reported cases, still over so many years in a country this size the number of these cases can hardly be characterized as significant. See also note 31 *infra*.

The number of cases alleging what would be equivalent to the common law tort of false imprisonment is substantially higher. But, as will appear below, this is the area where state law allows the highest recoveries.

[31] See Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 Harv. Civ. Rts. & Civ. Lib. L. Rev. 104, 105 n. 15 (1970); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1015, 1034 n. 124 (1967).

> favor of police officers. With little to gain they see no point in antagonizing the police. * * *
> [Note, 100 U. Pa. L. Rev. 1182, 1209 (1952).]

Further, "'[i]n the action for civil recovery, the testimony of the plaintiff will almost certainly be required which, in turn, opens up the possibility of introducing evidence of the criminal conviction to impeach credibility." Paulsen, *Safeguards in the Law of Search and Seizure,* 52 Nw. L. Rev. 65, 72 (1957). The jury's lack of sympathy for such plaintiffs is reflected in the small recoveries. Moreover, as the court below pointed out, one of the basic problems "is the understandable reluctance of both judge and jury to penalize law enforcement officers for violations of our increasingly technical body of Fourth Amendment jurisprudence." (App. 58).[32] Finally, even if a substantial award were won, the defendant officer may not be financially responsible.[33]

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[32] Since the privilege of removing the case from state to federal court will be exercised in every instance, there can be no claim that a new federal cause of action is needed because federal judges and jurors would tend to award higher recoveries than their counterparts in state courts.

Aside from removal, even if a federal cause of action in damages were created there would be no guarantee that these cases would be heard in federal court so long as the $10,000 amount-in-controversy requirement remains, 28 U.S.C. 1331(a).

[33] See Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 346–353 (1936). In addition, federal law, and doubtless the law of some states, forbids garnishment of the officer's salary. See, *e.g.*, *Buchanan* v. *Alexander*, 4 How. 20; *Federal Housing Administration* v. *Burr*, *309 U.S.* 242, 244, 250–251; *McGrew* v. *McGrew*, 38 F.

These factors, which would obtain even if a federal damage remedy were created, have been outlined in Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955), an article much relied upon by petitioner. In criticizing state law, Professor Foote distinguished between suits for false arrest or imprisonment and suits for trespass. In the former, damages beyond those measured by actual physical injury are routinely allowed and substantial jury awards thus are not uncommon.[34] Professor Foote proposes to solve the perceived inadequacies in state tort law by allowing tort actions to be brought directly against the government rather than against the offending officer.[35] This would provide a financially responsible defendant and make ir-

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2d 541, 544 (C.A. D.C.), certiorari denied, 281 U.S. 739; *United States* v. *Krakover*, 377 F. 2d 104 (C.A. 10).

There are no federal statutes or regulations authorizing reimbursement of judgments against federal law enforcement officers in these kinds of cases; and we know of no informal practice of doing so. Even if an informal practice did evolve, it is doubtful that funds would be available to cover awards as high as those sought in this case. In such event, the officers' only recourse would seem to be to seek a private bill, as government employees found it necessary to do prior to the Federal Tort Claims Act, 28 U.S.C. 2671–2680. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 550 & n. 7.

[34] He concluded, however, that such suits do not operate as an effective deterrent because (1) police are usually judgment proof; and (2) the cases where the deterrent is most needed involve plaintiffs who "lack the minimum elements of respectability" necessary for high jury awards. Foote, *supra*, at 497–500.

[35] A recent study agrees, Mathes and Jones, *Toward A "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 Geo. L. J. 889, 907–908 (1965).

relevant the fact that an officer, although acting illegally, was following his superior's command, a fact usually admissible in mitigation of damages. Foote, *supra*, at 514–515. Professor Foote also proposes a minimum damage recovery in order to induce plaintiffs to sue and to allow recovery even when the plaintiff does not have "clean hands." *Id.* at 515.

The problems Professor Foote seeks to solve are present, for the most part, in suits under 42 U.S.C. 1983, as well as under state tort law and would exist even if a new federal cause of action against federal officers were judicially created under the Fourth Amendment.[36] If these factors render state tort law—and presumably also Section 1983—ineffective, a new federal damage remedy could be expected to fare no better—unless Professor Foote's proposals were found desirable and adopted. But imposing liability directly on the federal government rather than on its agents, and providing a minimum amount of recovery would require action by Congress after careful study.[37]

[36] As Professor Foote himself points out with regard to minimum liquidated damages, "This suggestion is applicable to both the tort and civil rights actions, and in the case of the latter liquidated damages are particularly appropriate because 'there are many rights and immunities * * * which are not capable of money evaluation.'" Foote, *supra*, at 515, quoting *Hague* v. *C.I.O.*, 307 U.S. 496, 518, 529, (opinion of Mr. Justice Stone).

[37] Thus, in regard to suits brought directly against state or federal law enforcement officials, the decision whether a minimum recovery should be adopted and, if so, when and how much, is difficult and requires the kind of study and exploration only Congress and state legislatures can undertake. See

When there has been a significant gap in state law Congress has filled it. Traditional common law actions were inadequate to deal with wiretapping or electronic eavesdropping accomplished by nontrespassary means, which this Court held to be within the scope

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Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 717–718 (1970). The problem is that in setting minimum damages high enough to induce injured parties to sue, the police may be overdeterred: "If an officer resolves all doubts in favor of his own pocket book, the public interest in effective law enforcement is sure to suffer." 3 Davis, *Administrative Law* § 26.03 at 522 (1958). And since the legality of a search or seizure may often be a close question, it would be unfair to penalize the officer when he makes a good faith mistake, even though the person against whom the search or seizure was directed has suffered no less an affront. Perhaps the only answer is to let the matter "go to a jury or a judge with considerable freedom to register a judgment which can take account of these various imponderables." Jaffe, *Judicial Control of Administrative Action* 251 (1965); accord Davis, *supra*, at 522; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. L. Rev. 65, 73 (1957). Yet this is essentially how state common law operates and it may very well be that what has been perceived as a defect is in fact the only proper solution.

A good illustration of the need for flexibility is *Mason* v. *Wrightson*, 205 Md. 481, 109 A. 2d 128, which petitioner criticizes because only one cent was awarded in damages for a trespass by a police officer who conducted an illegal search. But the officer was acting pursuant to an order by his superior:

> Would an award of substantial damages have been desirable? Surely something would be wrong in a system in which a police sergeant would be personally penalized for conscientiously carrying out the orders of his superior. A policeman should not be required to get legal advice before following orders. * * *

Davis, *supra*, at 524–525.

of the Fourth Amendment. *Berger* v. *New York*, 388 U.S. 41; *Katz* v. *United States*, 389 U.S. 347, 353.[38] Accordingly, in 1968 Congress provided for a damage remedy against federal and state officers for the illegal interception of communications by wiretapping or electronic eavesdropping; liquidated damages of $100 a day, or $1,000, whichever is higher, as well as punitive damages, are authorized.[39]

2. A Judicially Created Federal Cause of Action in Damages Is Not Essential for Compensating Victims of Unlawful Searches and Seizures

We have shown that a judicially created federal damage remedy cannot be deemed essential for controlling federal law enforcement practices.[40] Petitioner also intimates, however, that such a remedy is necessary because state common law inadequately compensates the victim of an unlawful search or seizure. Consideration of this claim requires not only an evaluation of the law of New York, where petitioner could

[38] Prior cases had indicated this was not a Fourth Amendment violation. See *Olmstead* v. *United States*, 277 U.S. 438 (Constitution does not forbid wiretapping unless accomplished by actual unlawful entry into the house); *Goldman* v. *United States*, 316 U.S. 129 (electronic eavesdropping did not violate Fourth Amendment because there was no physical trespass); *On Lee* v. *United States*, 343 U.S. 747 (electronic recording of conversation did not violate Fourth Amendment because no trespass was committed); see also *Silverman* v. *United States*, 365 U.S. 505, 509.

[39] Omnibus Crime Control and Safe Streets Act of 1968, Section 802, 18 U.S.C. (Supp. V) 2520.

[40] Professor Foote evaluated the sufficiency of state law on the basis of how it fulfilled "its potential as a sanction to discourage police illegality." Foote, *supra*, at 501.

have sued, but also, and more important, the law generally prevailing in the states.

(a). In a very real sense, the person most harmed by an unlawful search and seizure is the person against whom incriminating evidence is thereby discovered—evidence that, if not suppressed, would lead to his conviction.[41] For such a person it is doubtful that monetary recovery, even of a substantial amount, would be sufficient vindication. But perhaps application of the exclusionary rule would be. As Professor Jaffe stated:

> Improperly seized evidence may be excluded, and thus fairly effective deterrence of police abuse is possible without the anomaly of awarding damages to a person for the embarrassment caused to him by the production of evidence relevant to his civil or criminal liability.

Jaffe, *Judicial Control of Administrative Action* 250 (1965).

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[41] See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 47:

> But in terms of practical consequences the damage suffered [from an illegal search] is primarily to property interests and is not significantly different from the damage resulting from illegal entries by burglars or other criminals. And both the offense to privacy and the damage to property, if they are felt by the wronged person to be of sufficient magnitude to justify the time and expense involved, may become the foundation for a civil suit for damages against the offending officers.
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> It is only the person who has violated the criminal laws and who has the tools or other evidence of his criminal conduct secreted in his home or office or automobile who finds that an illegal search results in equal or greater consequences to his personal liberty than does an illegal arrest. * * *

This still leaves cases where an unlawful search or seizure is carried out against an innocent person. As to actual physical injuries, either to person or property, or monetary loss, state law generally provides compensatory relief. See Foote, *supra,* at 498; *Wolf* v. *Colorado,* 338 U.S. at 43 (Murphy, J., dissenting). Beyond this, in actions for false imprisonment, juries are allowed wide scope in "attaching a dollar value to immeasurables such as the sense of humiliation, distress, disgrace or outrage, or the usually fictional damages to reputation." Foote, *supra,* at 497; see also 1 Sedgwick, *Damages* 51 (9th ed. 1912). Also, if an unlawful search takes place in the owner's presence, recovery beyond nominal damages may be allowed for emotional suffering even if no physical harm to person or property takes place.[42]

The Federal Tort Claims Act, 28 U.S.C. 2671–2680, under which state law applies, 28 U.S.C. 2674, may provide an adequate remedy in many such cases. Although actions for false imprisonment and false arrest are excepted, 28 U.S.C. 2680(h), the United States

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[42] See 1 Haper and James, *The Law of Torts* 666 (1956):

> Recovery is allowed in many instances where the only substantial harm is emotional, by finding some traditional legal peg on which to hang it. Thus if the court can find a battery or trespass, however t[illegible], it is much less reluctant to uphold plaintiff's c[illegible]or mental suffering. The character of defendant's bel[illegible]or is also of prime importance. * * *

See also *Prosser, Law of Torts* 44, 67–68 (Hornbook Series, 3d ed. 1964); 47 Am. Jurs. 549 (1954) ("In estimating the damages recoverable [for a wrongful search], injury to a person's property, reputation, and feelings may be taken into consideration, as well as disturbance of his family").

may be liable for trespasses committed by federal officers. See 3 Davis, *Administrative Law* § 25.08 at 470 (1958); *Hatahley* v. *United States*, 351 U.S. 173, 181. And in a suit directly against the United States, judgment-proof officers, or juries prone to sympathize with the law enforcement officer's lot, see 28 U.S.C. 2402, would be no obstacle.[43]

Even if, for example, recovery for emotional distress is precluded because the owner was away at the time of the search, there is still the possibility of recovering exemplary damages.[44] To be sure, some states do not allow exemplary damages in the absence of actual damages. See 3 Frumer, *Personal Injury*, Sec. 2.02 (1965); *Oleck, Damages to Persons and Property* 560.8–.10 (1961). However, in the present context such cases appear more theoretical than real: it seems improbable that, in the absence of the owner's consent or presence, an entry for the purpose of conducting a search could be accomplished without causing some actual damage which would serve as a basis for awarding exemplary damages in those states where such a basis is required.

(b). Specifically, in New York, where petitioner could have sued, nominal damages are proper for an action in trespass if the plaintiff fails to demonstrate that he suffered actual monetary loss. See *Dixon* v. *Clow*, 24 Wend. 187 (N.Y.); *Town of Guilderland*

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[43] Perhaps such suits would have less of a deterrent effect than suits directly against the officers. But cf. *United States* v. *Gilman*, 347 U.S. 507.

[44] Recovery of punitive damages would be precluded, however, under the Federal Tort Claims Act, 28 U.S.C. 2674.

v. *Swanson,* 29 App. Div. 2d 717, 286 N.Y.S. 2d 425; *Holmes* v. *State,* 32 Misc. 2d 1077, 226 N.Y.S. 2d 626. Exemplary damages are also available if the plaintiff can demonstrate actual malice, which is defined as conduct that may be deemed tantamount to wanton and willful or reckless disregard for plaintiff's rights. See *MacKennan* v. *Jay Bern Realty Co.,* 30 App. Div. 2d 679, 291 N.Y.S. 2d 953. And the general rule of damages in New York allows exemplary damages even in those situations where the only actual damages are nominal. See *Cherno* v. *Bank of Babylon,* 54 Misc. 2d 277, 282 N.Y.S. 2d 114, affirmed, 29 App. Div. 2d 767, 288 N.Y.S. 2d 862; *Underwriters' Laboratories, Inc.* v. *Smith,* 41 Misc. 2d 756, 246 N.Y.S. 2d 436.

In addition, petitioner here claims that the actions of the respondent agents caused him "humiliation, embarrassment and mental anguish" (App. 2). It has long been held that damages for mental harms can be recovered incident to an action for trespass.[45] While we have discovered no decision from New York's highest court directly on point, in *Reed* v. *New York & R. Gas Co.,* 93 App. Div. 453, 87 N.Y.S. 810, the court held in a trespass action that damages should take into account "injury, insult, invasion of the privacy and interference with the comfort of the

[45] See note 42 *supra.* Illustrative cases are *American Security Co.* v. *Cook,* 49 Ga. App. 723, 176 S.E. 798; *Meagher* v. *Driscoll,* 99 Mass. 281; *Lesch* v. *Great Northern Ry. Co.,* 97 Minn. 503, 106 Nw. 955; *Bouillon* v. *Gas Light Co.,* 148 Mo. App. 462, 129 S.W. 401; *Harris* v. *Delaware, L. & W. R. Co.,* 77 N.J.L. 278, 72 Atl. 50.

plaintiff and his family," 93 App. Div. at 455, even though only nominal physical damages resulted and even though punitive damages were precluded. Since New York has been among the leaders in allowing recovery for emotional harm,[46] it would seem the courts of that state would follow the general rule and allow such recovery in this kind of trespass action.

Also, petitioner has clearly stated a cause of action for false imprisonment. *Tierney* v. *State of New York*, 266 App. Div. 434, 12 N.Y.S. 2d 877, affirmed, 292 N.Y. 523, 54 N.E. 2d 207. In New York the measure of damages in such cases is that amount that will fairly compensate the injured person, considering the mental suffering, indignity, humiliation, shame and disgrace he has suffered. See *Fields* v. *Victory Chain Store, Inc.*, 300 N.Y.S. 2d 688. In addition, here, as in the usual case of an unlawful search and arrest, petitioner may have a cause of action for battery. See *Frady* v. *State*, 19 App. Div. 2d 783, 242 N.Y.S. 2d 95; *Pawloski* v. *State*, 45 Misc. 2d 933, 258 N.Y.S. 2d 258.[47] Recovery for mental distress is also permitted in such actions. See *Williams* v. *Underhill*, 63 App. Div. 223, 71 N.Y.S. 291.

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[46] See, *e.g.*, *Ferrara* v. *Galluchio*, 5 N.Y. 2d 16, 161 N.Y.S. 2d 832, 152 N.E. 2d 249 (liability in negligence, where only resulting harm was mental distress); *Battalla* v. *State*, 10 N.Y. 2d 237, 219 N.Y.S. 2d 34, 176 N.E. 2d 729 (allowing recovery for physical and mental harm incurred by fright negligently induced).

[47] These are civil cases. New York has waived sovereign immunity for torts committed by state, as distinguished from local or municipal, officers; the injured party may therefore pursue his action directly against the state. Court of Claims Act § 8, 29A McKinney's N.Y. Jud.—Court Acts (Part 2) (1963).

Accordingly, had petitioner brought his action in a New York court on the theories of trespass, false imprisonment, battery, and mental distress, he would have had the benefit of a body of state law that permits substantial recovery. Indeed, in 1935 an award of $1,500 actual damages and $500 exemplary damages was upheld in a case quite similar to the instant one. *Saurel* v. *Sellick*, 244 App. Div. 845, 279 N.Y.S. 323 (the police, without warrants, searched plaintiff's premises, arrested him and held him in custody for five hours).

(c). Of course, the question whether state law generally, or New York law in particular, provides accurate compensation is unanswerable for, as Mr. Justice Stone pointed out, "[t]here are many rights and immunities * * * which are not capable of money valuation." *Hague* v. *C.I.O.*, 307 U.S. 496, 518, 529 (separate opinion). Moreover, in suits against officers, it may be that the amount of damages should vary directly with the degree of knowing violation of the Fourth Amendment, even though from the point of view of the plaintiff the injury remains constant. See *Pierson* v. *Ray*, 386 U.S. 547. In light of these considerations, perhaps the only solution short of establishing liquidated damages is to leave the matter to the jury, with considerable latitude to "register a judgment which can take account of these various imponderables." Jaffe, Judicial Control of Administrative Action 251 (1965); see *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763), discussed in note 4 *supra*. This essentially describes the practice under state law. See note 37 *supra*.

3. The Absence of Federal Legislation Providing for a Cause of Action in Damages Under the Fourth Amendment Against Federal Officers Has Not Left a Void That This Court Should Attempt to Fill

The creation of a federal damage remedy is hardly a novel idea. Recently a Presidential Commission studied a similar proposal and concluded:

> One much discussed method of controlling police practice is to impose financial liability upon the governmental unit as well as the police officer who exceeds his authority. A somewhat similar approach is provided for under the Federal Civil Rights Act.
>
> The effect of the threat of possible civil liability upon police policy is not very great. In the first place, plaintiffs are seldom able to sustain a successful lawsuit because of the expense and the fact that juries are not likely to have compassion for a guilty, even if abused, plaintiff. Insurance is also now available along with other protective methods that insulate the individual officer from financial loss.
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> * * * * *
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> In general, it seems apparent that civil litigation is an awkward method of stimulating proper law enforcement policy. At most, it can furnish relief for the victim of clearly improper practices. To hold the individual officer liable in damages as a way of achieving systematic reevaluation of police practices seems neither realistic nor desirable.

The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* 31–32 (1967); see also Goldstein, *Ad-*

ministrative Problems in Controlling the Exercise of Police Authority, 58 J. Crim. L. C. & P. S. 160, 168 (1967); Paulsen, *Safeguards in the Law of Search and Seizure,* 52 Nw. L. Rev. 65, 73 (1957). In short, Congress' failure to provide the remedy petitioner seeks has not left a void that this Court should attempt to fill.

As to the present system, growth and improvement has always been the great tradition of the common law. When new situations are presented the state courts have the capacity for meeting them. If the tort law of some states is in need of improvement, there is no reason for supposing that the state courts are unable or unwilling to act.

In the absence of implementing legislation, judicial creation of a new, affirmative remedy to enforce a constitutional right should not be undertaken unless such a remedy is absolutely necessary. And when, as here, the remedy itself would be ineffective as a deterrent device, and suffer the same difficulties as comparable existing remedies, there is no necessity.[48] If the present system should be changed to provide additional remedies, the required study and choice among the numerous sanctions available is a matter for Congress in the absence of a demonstrable and

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[48] In an article much relied upon by petitioner, Professor Hill, after noting that the issue here is not "of great practical importance," does not urge that a federal damage remedy should be created under the Fourth Amendment and concedes that it is "at least arguable" that such a remedy is inappropriate. Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1111, 1155 (1969).

compelling need for another remedy within traditional judicial competence.[49]

Every lower federal court that has considered this question agrees. *Johnston* v. *Earle*, 245 F.2d 793 (C.A. 9); *Koch* v. *Zuieback*, 194 F. Supp. 651, 656 (S.D. Cal.), affirmed, 316 F. 2d 1 (C.A. 9) (Fifth Amendment); *Garfield* v. *Palmieri*, 193 F. Supp. 582 (E.D.N.Y.), affirmed *per curiam*, 290 F. 2d 821 (C.A. 2) (Fifth Amendment), certiorari denied, 368 U.S. 827; *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Cal.); see also *United States* v. *Faneca*, 332 F. 2d 872, 875 (C.A. 5). Until Congress acts, as it did with respect to wiretapping and electronic eavesdropping, see 18 U.S.C. (Supp. V) 2520, any claim for damages suffered as a consequence of an allegedly unlawful

[49] As Professor Packer soundly observed:

> As compared with the Supreme Court, the legislature (by which I mean generically the Congress and the legislative bodies of the states) has far greater institutional competence to deal with the intricate problems of laying down rules for the governance of the police and sanctions for their breach. The legislature has fact-finding facilities that the courts do not have. A court is not a programmatic institution; its mission is to decide cases according to law. And in the area of criminal procedure, the only source of law for the courts to apply is the Constitution, whose spacious imperatives can hardly be mistaken for a detailed code of criminal procedure. Most significantly, the legislature is in a far better position to do two things that lie at or near the heart of the police problem: to adjust the extent of powers given to the magnitude of the interests protected by the criminal law; and to devise adequate sanctions for breach of whatever rules it chooses to lay down for the governance of the police.

The New York Review of Books, Sept. 8, 1966, p. 10, quoted in Friendly, *Benchmarks* 265 (1967).

search and seizure must be pursued under the law of the state where the acts occurred.[30]

D. ABSENT A FEDERAL CAUSE OF ACTION FOR DAMAGES, NO OTHER THEORY OF FEDERAL QUESTION JURISDICTION JUSTIFIED THE RETENTION OF THE CASE IN FEDERAL COURT

In light of *Bell* v. *Hood*, 327 U.S. 678, the district court had jurisdiction to decide whether the Fourth Amendment gives rise to a cause of action for damages. However, contrary to the contentions of the *amicus curiae*, once the court determined that damages were not available under the Fourth Amendment, it properly dismissed the complaint on the merits. No other theory of federal jurisdiction justified retention of the case in federal court.

The *amicus* argues that even absent the federal cause of action, the complaint properly alleges jurisdiction under 28 U.S.C. 1331(a). But, as *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, makes clear, federal jurisdiction would be lacking because a well-pleaded complaint for trespass and false arrest under state law would not contain on its face the necessary federal question. The constitutional issue concerning violation of the Fourth Amendment is not a proper part of the complaint, but would arise only if the agents attempted to justify the intrusion and arrest as in accordance with their duties as federal law enforce-

[30] Congress could, of course, amend the Federal Tort Claims Act, 28 U.S.C. 2680, to allow recovery for false imprisonment against the United States, thereby avoiding the problems caused by judgment-proof defendants and the reluctance of juries to impose liability on individual officers. State law would still control the cause of action. 28 U.S.C. 2674. Compare pp. 34–35 *supra*.

ment officials. However, the plaintiff cannot confer federal jurisdiction by anticipating issues that may be raised as defenses to the complaint. *Louisville & Nashville R.R.* v. *Mottley, supra.*

Nor may he do so by adding allegations that are not required to establish his cause of action: "For this requirement it is no substitute that the defendant is almost certain to raise a federal defense." *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656, 663; *Gully* v. *First National Bank,* 299 U.S. 109, 112–113.[51] The court was therefore not required to pass on any state claims that might have been within the scope of petitioner's complaint. The doctrine of pendent jurisdiction, see *Hurn* v. *Oursler,* 289 U.S. 238, does not call for a different result. As this Court stated in *Mine Workers* v. *Gibbs,* 383 U.S. 715, 726, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

II

THIS COURT SHOULD NOT DECIDE WHETHER RESPONDENTS ARE IMMUNE FROM SUIT BECAUSE THEIR ACTS WERE DONE IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES

Both petitioner (Br. 16–24) and the *amicus* (Br. 13–17) urge that, if this Court holds petitioner has a cause of action for violation of his Fourth Amendment rights, it should then decide whether the respondents are immune from suit because of their

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[51] This principle also applies to assertion of the federal defense of official immunity.

claim that their acts were done in the performance of their official duties. Indeed, the *amicus* suggests that the Court should here reexamine and overrule *Barr* v. *Matteo*, 360 U.S. 564, its most recent decision dealing with the question of official immunity.

The court of appeals did not decide the question; neither should this Court. The only material pertinent to this issue in the record is petitioner's brief complaint (App. 1), his motion for summary judgment and supporting affidavit (App. 25–29) and the respondents' motion to dismiss (App. 31). These do not contain sufficient facts to permit an informed judgment on whether the respondents were acting within the scope of their duties. Compare *Pierson* v. *Ray*, 386 U.S. 547, 557. Before this Court should undertake to decide the issue—and certainly before it should consider reexamining *Barr* v. *Matteo*, *supra*—it should have a fuller record detailing all the significant facts relating to the issue.

Therefore, should this Court hold that petitioner's complaint does state a valid cause of action, it should remand the case to the district court to develop a fuller record on the official immunity issue.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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BIVENS *v.* SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 301. Argued January 12, 1971—Decided June 21, 1971

Petitioner's complaint alleged that respondent agents of the Federal Bureau of Narcotics, acting under color of federal authority, made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges. All of the acts were alleged to have been done without probable cause. Petitioner's suit to recover damages from the agents was dismissed by the District Court on the alternative grounds (1) that it failed to state a federal cause of action and (2) that respondents were immune from suit by virtue of their official position. The Court of Appeals affirmed on the first ground alone. *Held:*

1. Petitioner's complaint states a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the federal agents' violation of that Amendment. Pp. 390–397.

2. The Court does not reach the immunity question, which was not passed on by the Court of Appeals. Pp. 397–398.

409 F. 2d 718, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. HARLAN, J., filed an opinion concurring in the judgment, *post*, p. 398. BURGER, C. J., *post*, p. 411, and BLACK, J., *post*, p. 427, and BLACKMUN, J., *post*, p. 430, filed dissenting opinions.

Stephen A. Grant argued the cause and filed a brief for petitioner.

Jerome Feit argued the cause for respondents. On the brief were *Solicitor General Griswold, Assistant Attorney General Ruckelshaus,* and *Robert V. Zener.*

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In *Bell* v. *Hood*, 327 U. S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause.[1] Petitioner claimed to have suffered great humili-

[1] Petitioner's complaint does not explicitly state that the agents had no probable cause for his arrest, but it does allege that the arrest was "done unlawfully, unreasonably and contrary to law." App. 2. Petitioner's affidavit in support of his motion for summary

ation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, *inter alia*, that it failed to state a cause of action.[2] 276 F. Supp. 12 (EDNY 1967). The Court of Appeals, one judge concurring specially,[3] affirmed on that basis. 409 F. 2d 718 (CA2 1969). We granted certiorari. 399 U. S. 905 (1970). We reverse.

I

Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal agents. In respondents' view, however, the rights that petitioner asserts—primarily rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could de-

judgment swears that the search was "without cause, consent or warrant," and that the arrest was "without cause, reason or warrant." App. 28.

[2] The agents were not named in petitioner's complaint, and the District Court ordered that the complaint be served upon "those federal agents who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the [petitioner]." App. 3. Five agents were ultimately served.

[3] Judge Waterman, concurring, expressed the thought that "the federal courts can . . . entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages" for acts such as those alleged. In his view, however, the critical point was recognition that some cause of action existed, albeit a state-created one, and in consequence he was willing *"as of now"* to concur in the holding of the Court of Appeals. 409 F. 2d, at 726 (emphasis in original).

fend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision,[4] respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal agents, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relation-

[4] "[S]ince it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment, will ultimately be heard in a federal court." Brief for Respondents 13 (citations omitted); see 28 U. S. C. § 1442 (a); *Willingham* v. *Morgan*, 395 U. S. 402 (1969). In light of this, it is difficult to understand our Brother BLACKMUN'S complaint that our holding today "opens the door for another avalanche of new federal cases." *Post*, at 430. In estimating the magnitude of any such "avalanche," it is worth noting that a survey of comparable actions against state officers under 42 U. S. C. § 1983 found only 53 reported cases in 17 years (1951–1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation—Plaintiff's Remedies, 15 Am. Jur. Trials 555, 580–590 (1968). Increasing this figure by 900% to allow for increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years.

ship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Cf. *Amos* v. *United States*, 255 U. S. 313, 317 (1921); *United States* v. *Classic*, 313 U. S. 299, 326 (1941). Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U. S., at 684 (footnote omitted); see *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, 36 (1933) (Cardozo, J.); *The Western Maid*, 257 U. S. 419, 433 (1922) (Holmes, J.).

First. Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in *Gambino* v. *United States*, 275 U. S. 310 (1927), petitioners were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. *Id.*, at 314. Notwithstanding the lack of probable cause for the arrest, *id.*, at 313, it would have been permissible under state law if effected

by private individuals.[5] It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. *Id.*, at 315–317. Accordingly, if the Fourth Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in *Byars* v. *United States*, 273 U. S. 28 (1927), the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition agent participated in the search. This Court explicitly refused to inquire whether the warrant was "good under the state law . . . since in no event could it constitute the basis for a *federal* search and seizure." *Id.*, at 29 (emphasis added).[6] And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the

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[5] New York at that time followed the common-law rule that a private person may arrest another if the latter has in fact committed a felony, and that if such is the case the presence or absence of probable cause is irrelevant to the legality of the arrest. See *McLoughlin* v. *New York Edison Co.*, 252 N. Y. 202, 169 N. E. 277 (1929); cf. N. Y. Code Crim. Proc. § 183 (1958) for codification of the rule. Conspiracy to commit a federal crime was at the time a felony. Act of March 4, 1909, § 37, 35 Stat. 1096.

[6] Conversely, we have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local law. *McGuire* v. *United States*, 273 U. S. 95 (1927) (trespass *ab initio*); *Hester* v. *United States*, 265 U. S. 57 (1924) ("open fields" doctrine); cf. *Burdeau* v. *McDowell*, 256 U. S. 465 (1921) (possession of stolen property).

niceties of local trespass laws. *Katz* v. *United States*, 389 U. S. 347 (1967); *Berger* v. *New York*, 388 U. S. 41 (1967); *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See W. Prosser, The Law of Torts § 18, pp. 109–110 (3d ed. 1964); 1 F. Harper & F. James, The Law of Torts § 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different position. Cf. *Amos* v. *United States*, 255 U. S. 313, 317 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See *Weeks* v. *United States*, 232 U. S. 383, 386 (1914); *Amos* v. *United States*, *supra*.[7] "In such cases there is no safety for the citizen,

[7] Similarly, although the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, *Marron* v. *United States*, 275 U. S. 192, 196 (1927); see *Stanley* v. *Georgia*, 394 U. S. 557, 570–572 (1969) (STEWART, J.,

except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime." *United States* v. *Lee*, 106 U. S. 196, 219 (1882).[8] Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, *Byars* v. *United States*, *supra*; *Weeks* v. *United States*, *supra*; *In re Ayers*, 123 U. S. 443, 507 (1887), neither may state law undertake to limit the extent to which federal authority can be exercised. *In re Neagle*, 135 U. S. 1 (1890). The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action. Cf. *Boilermakers* v. *Hardeman*, 401 U. S. 233, 241 (1971).

Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon*, 286 U. S. 73 (1932);

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concurring in the result), a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect. See 1 F. Harper & F. James, The Law of Torts § 1.11 (1956).

[8] Although no State has undertaken to limit the common-law doctrine that one may use reasonable force to resist an unlawful arrest by a private person, at least two States have outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. R. I. Gen. Laws § 12-7-10 (1969); *State* v. *Koonce*, 89 N. J. Super. 169, 180–184, 214 A. 2d 428, 433–436 (1965).

Nixon v. *Herndon*, 273 U. S. 536, 540 (1927); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); J. Landynski, Search and Seizure and the Supreme Court 28 *et seq.* (1966); N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 43 *et seq.* (1937); Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 8–33 (1968); cf. *West* v. *Cabell*, 153 U. S. 78 (1894); *Lammon* v. *Feusier*, 111 U. S. 17 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S., at 684 (1946) (footnote omitted). The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of "federal fiscal policy," as in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 311 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that "the United States [was] the party plaintiff to the suit. And the United States has power at any time to create the liability." *Id.*, at 316; see *United States* v. *Gilman*, 347 U. S. 507 (1954). Nor are we asked in this case to impose liability upon a congressional employee for actions contrary to no constitu-

tional prohibition, but merely said to be in excess of the authority delegated to him by the Congress. *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963). Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964); *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra*, at 390–395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

II

In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. 276 F. Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not con-

sider it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE HARLAN, concurring in the judgment.

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, federal agents acting under color of federal law, subjected him to a search and seizure contravening the requirements of the Fourth Amendment. He sought damages in the amount of $15,000 from each of the agents. Federal jurisdiction was claimed, *inter alia*,[1] under 28 U. S. C. § 1331 (a) which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court dismissed the complaint for lack of federal jurisdiction under 28 U. S. C. § 1331 (a) and failure to state a claim for which relief may be granted. 276 F. Supp 12 (EDNY 1967). On appeal, the Court of Appeals concluded, on the basis of this Court's decision in *Bell* v. *Hood*, 327 U. S. 678 (1946), that petitioner's claim for damages did "[arise] under the Constitution"

[1] Petitioner also asserted federal jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3), and 28 U. S. C. § 1343 (4). Neither will support federal jurisdiction over the claim. See *Bivens* v. *Six Unknown Named Agents*, 409 F. 2d 718, 720 n. 1 (CA2 1969).

within the meaning of 28 U. S. C. § 1331 (a); but the District Court's judgment was affirmed on the ground that the complaint failed to state a claim for which relief can be granted. 409 F. 2d 718 (CA2 1969).

In so concluding, Chief Judge Lumbard's opinion reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a "wholly new federal cause of action founded directly on the Fourth Amendment," *id.*, at 721, and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a "mere 'form of words.'" *Id.*, at 723. The Government takes essentially the same position here. Brief for Respondents 4–5. And two members of the Court add the contention that we lack the constitutional power to accord Bivens a remedy for damages in the absence of congressional action creating "a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment." Opinion of MR. JUSTICE BLACK, *post*, at 427; see also opinion of THE CHIEF JUSTICE, *post*, at 418, 422.

For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

I

I turn first to the contention that the constitutional power of federal courts to accord Bivens damages for his claim depends on the passage of a statute creating a "federal cause of action." Although the point is not

entirely free of ambiguity,[2] I do not understand either the Government or my dissenting Brothers to maintain that Bivens' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. See *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938)—that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Compare *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105–107 (1945), with *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946). See also H. Hart & H. Wechsler, The Federal Courts and the Federal System 818–819 (1953).

Thus the interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. See generally Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 33–34 (1968).[3] Therefore, the question

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[2] See n. 3, *infra*.

[3] The Government appears not quite ready to concede this point. Certain points in the Government's argument seem to suggest that the "state-created right—federal defense" model reaches not only the question of the power to accord a federal damages remedy, but also the claim to any judicial remedy in any court. Thus, we are pointed to Lasson's observation concerning Madison's version of the Fourth Amendment as introduced into the House:

"The observation may be made that the language of the proposal did not purport to *create* the right to be secure from unreasonable

of judicial *power* to grant Bivens damages is not a problem of the "source" of the "right"; instead, the question is whether the power to authorize damages as a judicial

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search and seizures but merely stated it as a right which already existed."

N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 100 n. 77 (1937), quoted in Brief for Respondents 11 n. 7. And, on the problem of federal equitable vindication of constitutional rights without regard to the presence of a "state-created right," see Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 523–524 (1954), quoted in Brief for Respondents 17.

On this point, the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a "Bill of Rights" was the fear that individual liberties not specified expressly would be taken as excluded. See generally, Lasson, *supra*, at 79–105. This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law. See *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).

In truth, the legislative record as a whole behind the Bill of Rights is silent on the rather refined doctrinal question whether the framers considered the rights therein enumerated as dependent in the first interest on the decision of a State to accord legal status to the personal interests at stake. That is understandable since the Government itself points out that general federal-question jurisdiction was not extended to the federal district courts until 1875. Act of March 3, 1875, § 1, 18 Stat. 470. The most that can be drawn from this historical fact is that the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federally protected interest. One must first combine this assumption with contemporary modes of jurisprudential thought which appeared to link "rights" and "remedies" in a 1:1 correlation, cf. *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), before reaching the conclusion that the framers are to be understood today as having created no federally protected interests. And, of course, that would simply require the conclusion that federal equitable relief would not lie to protect those interests guarded by the Fourth Amendment.

Professor Hart's observations concerning the "imperceptible steps"

remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.

II

The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (1944). Cf. *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 201–204 (1967).[4]

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between *In re Ayers*, 123 U. S. 443 (1887), and *Ex parte Young*, 209 U. S. 123 (1908), see Hart, *supra*, fail to persuade me that the source of the legal interest asserted here is other than the Federal Constitution itself. *In re Ayers* concerned the precise question whether the Eleventh Amendment barred suit in a federal court for an injunction compelling a state officer to perform a contract to which the State was a party. Having concluded that the suit was inescapably a suit against the State under the Eleventh Amendment, the Court spoke of the presence of state-created rights as a distinguishing factor supporting the exercise of federal jurisdiction in other contract clause cases. The absence of a state-created right in *In re Ayers* served to distinguish that case from the perspective of the State's immunity to suit; *Ayers* simply does not speak to the analytically distinct question whether the Constitution is in the relevant sense a source of legal protection for the "rights" enumerated therein.

[4] The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal

If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently "legislative," then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 304–311 (1947); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943)—is powerless to accord a damages

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cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum, cf. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 462–463 (1957) (Frankfurter, J., dissenting)—a private cause of action for damages for violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a). See § 27, 48 Stat. 902, 15 U. S. C. § 78aa. We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1120–1121 (1969); nor did the *Borak* Court purport to do so. See *Borak*, *supra*, at 432–434. The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. See *ibid.*, and *Bell* v. *Hood*, *supra*, at 684.

remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May 8, 1792, § 2, 1 Stat. 276; C. Wright, Law of Federal Courts 257 (2d ed., 1970), in part because of the limited availability of equitable remedies in state courts in the early days of the Republic. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 104–105 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395–396 (1946); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 165–166 (1939). The reach of a federal district court's "inherent equitable powers," *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 460 (Burton, J., concurring in the result), is broad indeed, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U. S. 1 (1971); nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit. See *Textile Workers* v. *Lincoln Mills*, *supra*, at 460 (Burton, J., concurring in the result); Katz, 117 U. Pa. L. Rev., at 43.[5]

[5] With regard to a court's authority to grant an equitable remedy, the line between "subject matter" jurisdiction and remedial powers has undoubtedly been obscured by the fact that historically the

If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U. S. C. § 1331 (a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.[6] Of course, the special historical traditions governing the federal equity system, see *Sprague* v. *Ticonic National Bank*, 307 U. S. 161

"system of equity 'derived its doctrines, as well as its powers, from its mode of giving relief.'" See *Guaranty Trust Co.* v. *York*, *supra*, at 105, quoting C. Langdell, Summary of Equity Pleading xxvii (1877). Perhaps this fact alone accounts for the suggestion sometimes made that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution. See *Bell* v. *Hood*, 71 F. Supp. 813, 819 (SD Cal. 1947).

[6] Chief Judge Lumbard's opinion for the Court of Appeals in the instant case is, as I have noted, in accord with this conclusion:

"Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress." 409 F. 2d, at 723.

The description of the remedy as "inferred" cannot, of course, be intended to assimilate the judicial decision to accord such a remedy to any process of statutory construction. Rather, as with the cases concerning remedies, implied from statutory schemes, see n. 4, *supra*, the description of the remedy as "inferred" can only bear on the reasons offered to explain a judicial decision to accord or not to accord a particular remedy.

(1939), might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

III

The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is "essential," or "indispensable for vindicating constitutional rights." Brief for Respondents 19, 24. While this "essentiality" test is most clearly articulated with respect to damages remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. *Id.*, at 17–18. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that "[i]f Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers . . . ." *Id.*, at 20–21; see 42 U. S. C. § 1983. Although conceding that the standard of determining whether a damage remedy should be utilized to effectuate statutory policies is one of "necessity" or "appropriateness," see *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947), the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on

the exercise of judicial power with respect to this class of legally protected interests. Brief for Respondents 21–22.

These arguments for a more stringent test to govern the grant of damages in constitutional cases [7] seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas R. Co.* v. *May*, 194 U. S. 267, 270 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. Cf. *J. I. Case Co.* v. *Borak*, *supra*, at 432; *United States* v. *Standard Oil Co.*, *supra*, at 307; Hill, Constitutional Remedies, 69 Col. L. Rev. 1109, 1155 (1969); Katz, 117 U. Pa. L. Rev., at 72. In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according Bivens

[7] I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.[8] Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. Bivens, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

And I think it is clear that Bivens advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of "privacy"; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life

[8] And I think it follows from this point that today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies—other than traditionally available forms of judicial relief—for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies. Compare today's decision with *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Weeks* v. *United States*, 232 U. S. 383 (1914). The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; *i. e.*, that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies. Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies, see Hill, The Bill of Rights and the Supervisory Power, 69 Col. L. Rev. 181, 182–185 (1969)—are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, cf. *Bell* v. *Hood*, *supra*, at 684, is a separate question.

are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.[9]

On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe* v. *Pape*, 365 U. S. 167, 195 (1961) (HARLAN, J., concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); *Monroe* v. *Pape*, *supra*, at 194–195 (HARLAN, J., concurring); *Howard* v. *Lyons*, 360 U. S. 593 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–311 (1947).

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged

[9] The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. See *Monroe* v. *Pape*, 365 U. S. 167, 196 n. 5 (HARLAN, J., concurring).

position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly *de minimis*. And I simply cannot agree with my Brother BLACK that the possibility of "frivolous" claims—if defined simply as claims with no legal merit—warrants closing the courthouse doors to people in Bivens' situation. There are other ways, short of that, of coping with frivolous lawsuits.

On the other hand, if—as I believe is the case with respect, at least, to the most flagrant abuses of official power—damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies.

See *J. I. Case Co.* v. *Borak, supra.* Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Of course, for a variety of reasons, the remedy may not often be sought. See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955). And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. Cf. *Barr* v. *Matteo,* 360 U. S. 564 (1959) (opinion of HARLAN, J.). But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

For these reasons, I concur in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separa-

tion of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say: [1]

> "And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility."

This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks* v. *United States*, 232 U. S. 383 (1914); *Boyd* v. *United States*, 116 U. S. 616, 633 (1886) (dictum). This rule was extended to the States in *Mapp* v. *Ohio*, 367 U. S. 643 (1961).[2]

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[1] J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 88 (Phoenix ed. 1967).

[2] The Court reached the issue of applying the *Weeks* doctrine to the States *sua sponte*.

The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

The deterrence theory underlying the Suppression Doctrine, or Exclusionary Rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People* v. *Defore*, 242 N. Y. 13, 21, 23–24, 150 N. E. 585, 587, 588 (1926).[3]

The plurality opinion in *Irvine* v. *California*, 347 U. S. 128, 136 (1954), catalogued the doctrine's defects:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

From time to time members of the Court, recognizing the validity of these protests, have articulated varying

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[3] What Cardozo suggested as an example of the potentially far-reaching consequences of the Suppression Doctrine was almost realized in *Killough* v. *United States*, 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962).

alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the "sporting contest" thesis that the government must "play the game fairly" and cannot be allowed to profit from its own illegal acts. *Olmstead* v. *United States*, 277 U. S. 438, 469, 471 (1928) (dissenting opinions); see *Terry* v. *Ohio*, 392 U. S. 1, 13 (1968). But the Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the Exclusionary Rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

The Exclusionary Rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the suppression of evidence seized in violation of the latter. *Boyd* v. *United States*, *supra*, at 633 (dictum); *Wolf* v. *Colorado*, 338 U. S. 25, 47, 48 (1949) (Rutledge, J., dissenting); *Mapp* v. *Ohio*, *supra*, at 661–666 (BLACK, J., concurring).

Even ignoring, however, the decisions of this Court which have held that the Fifth Amendment applies only to "testimonial" disclosures, *United States* v. *Wade*, 388 U. S. 218, 221–223 (1967); *Schmerber* v. *California*, 384 U. S. 757, 764 and n. 8 (1966), it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the

evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458 (1913).

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the Exclusionary Rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.

This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. See Martin, The Exclusionary Rule Under Foreign Law—Canada, 52 J. Crim. L. C. & P. S. 271, 272 (1961); Williams, The Exclusionary Rule Under Foreign Law—England, 52 J. Crim. L. C. & P. S. 272 (1961).

I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like *Irvine* indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the Suppression Doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy, and hence the Court finds

it necessary now—55 years later—to construct a remedy of its own.

Some clear demonstration of the benefits and effectiveness of the Exclusionary Rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667 (1970).

There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine. *Id.*, at 710. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The Suppression Doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. For example, the dissenters in *Wolf* v. *Colorado*, *supra*, at 44, argued that:

> "Only by exclusion can we impress upon the zealous *prosecutor* that violation of the Constitution will do him no good. And only when that point is driven home can the *prosecutor* be expected to emphasize

> the importance of observing the constitutional demands in *his instructions to the police.*" (Emphasis added.)

But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not "reasonable" amply demonstrate.[4] Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the Exclu-

[4] For example, in a case arising under *Mapp*, *supra*, state judges at every level of the state judiciary may find the police conduct proper. On federal habeas corpus a district judge and a court of appeals might agree. Yet, in these circumstances, this Court, reviewing the case as much as 10 years later, might reverse by a narrow margin. In these circumstances it is difficult to conclude that the policeman has violated some rule that he should have known was a restriction on his authority.

sionary Rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—hence the rule has virtually no applicability and no effect in such situations. Oaks, *supra*, at 720–724.

Today's holding seeks to fill one of the gaps of the Suppression Doctrine—at the price of impinging on the legislative and policy functions which the Constitution vests in Congress. Nevertheless, the holding serves the useful purpose of exposing the fundamental weaknesses of the Suppression Doctrine. Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressures inherent in police work having to do with serious crimes.

Although unfortunately ineffective, the Exclusionary Rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment. For example, in *Miller* v. *United States*, 357 U. S. 301, 309–310 (1958), reliable evidence was suppressed because of a police officer's failure to say a "few more words" during the arrest and search of a known narcotics peddler.

This Court's decision announced today in *Coolidge* v. *New Hampshire*, *post*, p. 443, dramatically illustrates the extent to which the doctrine represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price which society pays. I dissented in *Coolidge* primarily because I do not believe the Fourth Amendment had been violated. Even on the Court's contrary premise, however, whatever violation

occurred was surely insufficient in nature and extent to justify the drastic result dictated by the Suppression Doctrine. A fair trial by jury has resolved doubts as to Coolidge's guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial—years after the crime—in which evidence that the New Hampshire courts found relevant and reliable will be withheld from the jury's consideration. It is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. See ALI, Model Code of Pre-Arraignment Procedure § SS 8.02 (2), p. 23 (Tent. Draft No. 4, 1971), reprinted in the Appendix to this opinion. Yet for over 55 years, and with increasing scope and intensity as today's *Coolidge* holding shows, our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the Exclusionary Rule, our resistance to change, and our refusal even to acknowledge the need

for effective enforcement mechanisms bring to mind Holmes' well-known statement:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

In characterizing the Suppression Doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the Suppression Doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.

I do not propose, however, that we abandon the Suppression Doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to

take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on "criminals" had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the Suppression Doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the Suppression Doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is surely serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and

purpose fully or because he failed to utter a "few more words." See *Miller* v. *United States, supra.* Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a "criminal" and probably will not punish an officer for honest errors of judgment. In any event an actual recovery depends on finding non-exempt assets of the police officer from which a judgment can be satisfied.

I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim has a simple and obvious remedy—an action for money damages against the guard's employer, the department store. W. Prosser, The Law of Torts § 68, pp. 470–480 (3d ed. 1964).[5] Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the Suppression Doctrine, of course, can never accomplish.

A simple structure would suffice.[6] For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal

[5] Damage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action.

[6] Electronic eavesdropping presents special problems. See 18 U. S. C. §§ 2510–2520 (1964 ed., Supp. V).

acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against "criminals" that has sometimes moved lay jurors to deny claims. In addition to awarding damages, the record of the police conduct that is condemned would undoubtedly become a relevant part of an officer's personnel file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated. Finally, appellate judicial review could be made available on much the same basis that it is now provided as to district courts and regulatory agencies. This would leave to the courts the ultimate responsibility for determining and articulating standards.

Once the constitutional validity of such a statute is established,[7] it can reasonably be assumed that the States

[7] Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.

would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement on the one hand and away from the irrational and drastic results of the Suppression Doctrine on the other. Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the Exclusionary Rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

In a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked. I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the Suppression Doctrine revealing thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error—such as petitioner claims to be—have been afforded meaningful redress.

APPENDIX TO OPINION OF BURGER, C. J., DISSENTING

It is interesting to note that studies over a period of years led the American Law Institute to propose the following in its tentative draft of a model pre-arraignment code:

> "(2) *Determination.* Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a

violation of any of the provisions of this code shall be granted *only if the court finds that such violation was substantial.* In determining whether a violation is substantial the court shall consider all the circumstances, including:

"(a) the importance of the particular interest violated;

"(b) the extent of deviation from lawful conduct;

"(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations of this Code;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"(3) *Fruits of Prior Unlawful Search.* If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code."

ALI, Model Code of Pre-Arraignment Procedure §§ SS 8.02 (2), (3), pp. 23–24 (Tent. Draft No. 4, 1971) (emphasis supplied).

The Reporters' views on the Exclusionary Rule are also reflected in their comment on the proposed section:

> "The Reporters wish to emphasize that they are not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665 (1970). Paragraph (2) embodies what the Reporters hope is a more flexible approach to the problem, subject of course to constitutional requirements." *Id.*, comment, at 26–27.

This is but one of many expressions of disenchantment with the Exclusionary Rule; see also:

1. Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Calif. L. Rev. 565 (1955).

2. Burns, *Mapp* v. *Ohio*: An All-American Mistake, 19 DePaul L. Rev. 80 (1969).

3. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 951–954 (1965).

4. F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1–84 (3d ed. 1968).

5. LaFave, Improving Police Performance Through the Exclusionary Rule (pts. 1 & 2), 30 Mo. L. Rev. 391, 566 (1965).

6. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987 (1965).

7. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 101 (1970).

8. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

9. Plumb, Illegal Enforcement of the Law, 24 Cornell L. Q. 337 (1939).

10. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw. U. L. Rev. 1 (1969).

11. Waite, Judges and the Crime Burden, 54 Mich. L. Rev. 169 (1955).

12. Waite, Evidence—Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944).

13. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. J. 479 (1922).

14. 8 J. Wigmore, Evidence § 2184a (McNaughton rev. 1961).

MR. JUSTICE BLACK, dissenting.

In my opinion for the Court in *Bell* v. *Hood*, 327 U. S. 678 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against *state* officials acting under color of state law,* it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against

* "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979, 42 U. S. C. § 1983.

federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For us to do so is, in my judgment, an exercise of power that the Constitution does not give us.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court has reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which

I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.